This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 078 579 323

HARVARD LAW LIBRARY

Received MAY 18 1917

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 21, 1915, TO JANUARY 3, 1916

JAMES M. REASONER
STATE REPORTER

0-18)24/21

VOL. 189

FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1917

Digitized by Google

Copyright, 1917, by Coleman C. Vaughan, Secretary of State for the State of Michigan.

MAY 18 1917

Digitized by Google

SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
FLAVIUS L. BROOKE,[1] DETROIT, . . .	Dec. 31, 1915
JOHN W. STONE,[2] MARQUETTE, ...	Dec. 31, 1917

ASSOCIATE JUSTICES.

ROLLIN H. PERSON,[3] LANSING.	
FRANZ C. KUHN, MT. CLEMENS, . . .	Dec. 31, 1917
JOHN W. STONE,[1] MARQUETTE, ...	Dec. 31, 1917
RUSSELL C. OSTRANDER, LANSING, . .	Dec. 31, 1919
JOHN E. BIRD, ADRIAN, ...	Dec. 31, 1919
JOSEPH B. MOORE, LAPEER, ...	Dec. 31, 1921
JOSEPH H. STEERE, SAULT STE. MARIE, . .	Dec. 31, 1921
FLAVIUS L. BROOKE,[2] DETROIT, . . .	Dec. 31, 1923

CLERK—CHARLES C. HOPKINS, LANSING.

CRIER—ANDREW B. CHAPIN, LANSING.

ATTORNEY GENERAL—GRANT FELLOWS, HUDSON.

The residences of the judges, given above, are as of the date of their election.

[1]To December 31, 1915.

[2]From January 1, 1916.

[3]Appointed July 16, 1915, to fill vacancy.

Digitized by Google

CIRCUIT JUDGES.

1.	GUY M. CHESTER,	HILLSDALE.
2.	GEORGE W. BRIDGMAN,	BENTON HARBOR.
3.	ALFRED J. MURPHY, GEORGE S. HOSMER, HENRY A. MANDELL, P. J. M. HALLY, GEORGE P. CODD, PHILIP T. VAN ZILE,	DETROIT.
4.	JAMES A. PARKINSON,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	GEORGE W. SMITH,	PONTIAC.
7.	MARK W. STEVENS,	FLINT.
8.	FRANK D. M. DAVIS,	IONIA.
9.	GEORGE V. WEIMER,	KALAMAZOO.
10.	WILLIAM G. GAGE, WILLIAM R. KENDRICK,	SAGINAW.
11.	LOUIS H. FEAD,	NEWBERRY.
12.	PATRICK H. O'BRIEN,	HOUGHTON.
13.	FREDERICK W. MAYNE,	CHARLEVOIX.
14.	JAMES E. SULLIVAN,	MUSKEGON.
15.	FREDERICK W. KNOWLEN,	CONSTANTINE.
16.	JAMES G. TUCKER,	MT. CLEMENS.
17.	WILLIS B. PERKINS, JOHN S. McDONALD, WILLIAM B. BROWN,	GRAND RAPIDS.
18.	CHESTER L. COLLINS,	BAY CITY.
19.	CHARLES A. WITHEY,	REED CITY.
20.	ORIEN S. CROSS,	ALLEGAN.
21.	PETER F. DODDS,	MT. PLEASANT.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	ALBERT WIDDIS,	TAWAS CITY.
24.	WATSON BEACH,	LEXINGTON.
25.	RICHARD C. FLANNIGAN,	NORWAY.
26.	FRANK EMERICK,	ALPENA.
27.	JOSEPH BARTON,	BIG RAPIDS.
28.	FRED S. LAMB,	CADILLAC.
29.	KELLEY S. SEARL,	ITHACA.

Digitized by Google

30.	HOWARD WIEST, ...	LANSING.
	CHARLES B. COLLINGWOOD, .	EAST LANSING.
31.	EUGENE F. LAW, HARVEY TAPPAN, ...	PORT HURON.
32.	SAMUEL S. COOPER, . . .	IRONWOOD.
33.	FRANK SHEPHERD, . . .	CHEBOYGAN.
34.	NELSON SHARPE, ...	WEST BRANCH.
35.	SELDEN S. MINER, ...	OWOSSO.
36.	L. BURGET DES VOIGNES, . .	CASSOPOLIS.
37.	WALTER H. NORTH, . . .	BATTLE CREEK.
38.	EDWARD R. GILDAY, . . .	MONROE.
39.	BURTON L. HART, ...	ADRIAN.
40.	WILLIAM B. WILLIAMS,[1] . .	LAPEER.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

WILLIAM F. CONNOLLY, EDWARD J. JEFFRIES.

SUPERIOR COURT OF GRAND RAPIDS, PETER J. DANHOF.

[1]Appointed January 1, 1916, to fill vacancy caused by creation of new circuit.

Digitized by Google

JUDICIAL CIRCUITS.

Counties.	Circuits.
Alcona	23
Alger	11
Allegan	20
Alpena	26
Antrim	13
Arenac	34
Baraga	12
Barry	5
Bay	18
Benzie	28
Berrien	2
Branch	15
Calhoun	37
Cass	36
Charlevoix	13
Cheboygan	33
Chippewa	11
Clare	21
Clinton	29
Crawford	34
Delta	25
Dickinson	25
Eaton	5
Emmet	33
Genesee	7
Gladwin	34
Gogebic	32
Grand Traverse	13
Gratiot	29
Hillsdale	1
Houghton	12
Huron	24
Ingham	30
Ionia	8
Iosco	23
Iron	25
Isabella	21
Jackson	4
Kalamazoo	9
Kalkaska	28
Kent	17
Keweenaw	12
Lake	19
Lapeer	40
Leelanau	13
Lenawee	39
Livingston	35
Luce	11
Mackinac	33
Macomb	16
Manistee	19
Marquette	25
Mason	19
Mecosta	27
Menominee	25
Midland	21
Missaukee	28
Monroe	38
Montcalm	8
Montmorency	26
Muskegon	14
Newaygo	27
Oakland	6
Oceana	14
Ogemaw	34
Ontonagon	32
Osceola	19
Oscoda	23
Otsego	34
Ottawa	20
Presque Isle	29
Roscommon	34
Saginaw	10
St. Clair	31
St. Joseph	15
Sanilac	24
Schoolcraft	11
Shiawassee	35
Tuscola	24
Van Buren	36
Washtenaw	22
Wayne	3
Wexford	28

Digitized by Google

TABLE OF CASES REPORTED.

	PAGE
Alger County Board of Supervisors, Baldwin *v*...	372
Alpert *v.* Plotkin.....	232
American Brass Co. *v.* Emery.....	593
American Car & Foundry Co., Matwiczuk *v*.....	449
Anderson, Gungrich *v*.....	144
Ann Arbor *v.* Goodspeed Real Estate Co.....	165
———, Osborn *v*.....	96
Ann Arbor Railroad Co., Otto *v*.....	463
Aphoresmenos *v.* McIntosh.....	680
Auditor General *v.* Nelson.....	93
Ayer, McQuillan *v*.....	566
Baldwin *v.* Board of Supervisors of Alger County.	372
Barber *v.* McMicking.....	266
Barrett, Spiegel *v*.....	111
Bender, Sloman *v*.....	258
Blair, Hooker *v*.....	278
Blodgett *v.* Kent Circuit Judge.....	9
Board of State Auditors, Horton *v*.....	666
———, Kearney *v*.....	666
Board of Supervisors of Alger County, Baldwin *v*.	372
Brooks *v.* Parks.....	490
Brown *v.* Township of Byron.....	584
Butterfield *v.* Reynolds.....	152
Byron Township, Brown *v*.....	584
Carlson *v.* Wyman.....	402
Central City Lumber Co., Leever *v*.....	181

Digitized by Google

PAGE
Chappell's Estate, *In re*..... 526
Charlevoix Circuit Judge, Wisconsin Chair Co. *v*.. 548
City of Ann Arbor *v*. Goodspeed Real Estate Co.. 165
———, Osborn *v*..... 96
City of Detroit, St. Joseph's Church *v*..... 408
City of Ironwood, Morrison *v*..... 117
City of Lansing, Ferle *v*..... 501
Clark *v*. Clark..... 652
——— *v*. North American Union..... 589
Cline *v*. Studebaker Corporation..... 514
Collins *v*. Collins..... 659
Cook *v*. Michigan Central Railroad Co..... 456
Culley *v*. Culley..... 496

Dallavo *v*. Dallavo..... 350
Dams *v*. Vinton Co..... 12
Deacon, Loud *v*..... 177
Deem *v*. Kalamazoo Paper Co..... 655
Detroit, St. Joseph's Church *v*..... 408
Detroit, Jackson & Chicago Railway, Dunn *v*.... 294
Detroit United Railway, Littlewood *v*..... 388
———, Ponke *v*..... 74
———, Shevchenko *v*..... 421
Dodge *v*. North End Improvement Association... 16
Dolemba, Gilecki *v*..... 107
Donohue *v*. Vosper..... 78
Dugas *v*. Munising, M. & S. E. Railway Co..... 620
Dunn *v*. Detroit, Jackson & Chicago Railway.... 294

Eagle, People *v*..... 404
Ebers, Hecht *v*..... 573
Elsey *v*. J. L. Hudson Co..... 135
Emery, American Brass Co. *v*..... 593

Falls *v*. Grand Rapids, Grand Haven & Muskegon Railway Co..... 644

Digitized by Google

PAGE
Feist *v.* Root 595
Fellowcraft Club, Sikora *v.* 235
Ferle *v.* City of Lansing 501
Finbarg, Hicks *v.* 332
Folly Theatre Co., Weingarden *v.* 220, 225
Fuller *v.* Metcalf 520

Germain *v.* Loud 38
Gifford *v.* Washtenaw Circuit Judge 546
Gilecki *v.* Dolemba 107
Goodspeed Real Estate Co., City of Ann Arbor *v.* . 165
Gourlay *v.* Insurance Company of North America 384
Grand Rapids & Indiana Railway Co., Jorgensen *v.* 537
Grand Rapids, Grand Haven & Muskegon Railway Co., Falls *v.* 644
Grand Trunk Railway Co. of Canada, Papinaw *v.* 441
Gungrich *v.* Anderson 144

Haight, Harnau *v.* 600
Hall, Sproat *v.* 28
Harnau *v.* Haight 600
Harvey, Lerner *v.* 249
Hecht *v.* Ebers 573
Hehl, Shaw *v.* 425
Henry *v.* Michigan Central Railroad Co 45
Hicks *v.* Finbarg 332
Hilderink, Story & Clark Piano Co. *v.* 123
Hilton, Millar *v.* 635
Hoey *v.* Ross 193
Hooker *v.* Blair 278
Horton *v.* Board of State Auditors 666
Hudson (J. L.) Co., Elsey *v.* 135
Hydrex Silent Exhaust Works *v.* Seager Engine Works 431

Digitized by Google

PAGE
In re Chappell's Estate..... 526
——— Keene's Estate..... 97
——— Wigent's Estate..... 507
Insurance Company of North America, Gourlay *v*..... 384
Ironwood, Morrison *v*..... 117

Jacobson, Pentland *v*..... 339
J. L. Hudson Co., Elsey *v*..... 135
Jordan *v.* Wixson..... 288
Jorgensen *v.* Grand Rapids & Indiana Railway Co. 537

Kalamazoo Paper Co., Deem *v*..... 655
Kearney *v.* Board of State Auditors..... 666
Keene, Maynard *v*..... 97
Keene's Estate, *In re*..... 97
Kennedy *v.* Van Buren County Drain Commissioner 676
Kent Circuit Judge, Blodgett *v*..... 9
Kern, Michigan State Bank of Eaton Rapids *v*... 467
Keyes, Minds *v*..... 629

Lacey *v.* Lacey..... 271
Lake Shore & Michigan Southern Railway Co. *v.* Sterling 366
Lakewood Utilities Co., Stevens *v*..... 203
Lansing, Ferle *v*..... 501
Lardie *v.* Traverse City Iron Works..... 210
Leever *v.* Central City Lumber Co..... 181
Lerner *v.* Harvey..... 249
Littlewood *v.* Detroit United Railway..... 388
Lobdell-Emery Manufacturing Co., Martindale *v*. 477
Locomotive Engineers' and Conductors' Mutual Protective Association, Palmer *v*..... 35

Digitized by Google

PAGE
Loud *v.* Deacon 177
———, Germain *v.* 38
Lumley, People *v.* 613

McClintic-Marshall Construction Co., Sauer *v.* .. 577
McCreery *v.* Roff 558
McIntosh, Aphoresmenos *v.* 680
McMicking, Barber *v.* 266
McPherson *v.* Western Union Telegraph Co. 471
McQuillan *v.* Ayer 566
Manistee Railway Co., Sceba *v.* 308
Martindale *v.* Lobdell-Emery Manufacturing Co. . 477
Mashek Chemical & Iron Co., Smedley *v.* 64
Mason, Shumway *v.* 623
Matwiczuk *v.* American Car & Foundry Co. 449
Maynard *v.* Keene 97
Meader, Poss *v.* 323
Merriman *v.* Vandemark 226
Metcalf, Fuller *v.* 520
Michigan Central Railroad Co., Cook *v.* 456
———, Henry *v.* 45
Michigan State Bank of Eaton Rapids *v.* Kern ... 467
Millar *v.* Hilton 635
Miller *v.* Riverside Storage & Cartage Co. 360
———, Roff *v.* 558
Minds *v.* Keyes 629
Morrison *v.* City of Ironwood 117
Morton *v.* Roth 198
Munising, M. & S. E. Railway Co., Dugas *v.* 620

Nelson, Auditor General *v.* 93
———, Voorhees *v.* 684
Newell *v.* Reid 174
North American Union, Clark *v.* 589
North End Improvement Association, Dodge *v.* ... 16
Norton *v.* Williams 69

Digitized by Google

PAGE
Osborn *v.* City of Ann Arbor..... 96
Otto *v.* Ann Arbor Railroad Co..... 463

Palmer *v.* Locomotive Engineers' and Conductors' Mutual Protective Association..... 35
Papinaw *v.* Grand Trunk Railway Co. of Canada. 441
Parks, Brooks *v*..... 490
Parmalee *v.* Wigent's Estate..... 507
Patek *v.* Ryskewiecz..... 344
Peacock *v.* Stinchcomb..... 301
Pentland *v.* Jacobson..... 339
People *v.* Eagle..... 404
——— *v.* Lumley..... 613
——— *v.* Plummer..... 415
Plotkin, Alpert *v*..... 232
Plummer, People *v*..... 415
Ponke *v.* Detroit United Railway..... 74
Poss *v.* Meader..... 323
Prentis *v.* Prentis..... 1

Reid, Newell *v*..... 174
Reynolds, Butterfield *v*..... 152
Riverside Storage & Cartage Co., Miller *v*..... 360
Roff *v.* Miller..... 558
———, McCreery *v*..... 558
Root, Feist *v*..... 595
Ross, Hoey *v*..... 193
Roth, Morton *v*..... 198
Ryskewiecz, Patek *v*..... 344

St. Joseph's Church *v.* City of Detroit..... 408
Sauer *v.* McClintic-Marshall Construction Co.... 577
Sceba *v.* Manistee Railway Co..... 308
Seager Engine Works, Hydrex Silent Exhaust Works *v*..... 431
Shaw *v.* Hehl..... 425

Digitized by Google

PAGE
Shevchenko *v.* Detroit United Railway..... 421
Shumway *v.* Mason..... 623
Sikora *v.* Fellowcraft Club..... 235
Sloman *v.* Bender..... 258
Smedley *v.* Mashek Chemical & Iron Co..... 64
Spiegel *v.* Barrett..... 111
Sproat *v.* Hall..... 28
State Auditors, Horton *v*..... 666
———, Kearney *v*..... 666
Sterling, Lake Shore & Michigan Southern Railway Co. *v*..... 366
Stevens *v.* Lakewood Utilities Co..... 203
Stinchcomb, Peacock *v*..... 301
Story & Clark Piano Co. *v.* Hilderink..... 123
Studebaker Corporation, Cline *v*..... 514

Township of Byron, Brown *v*..... 584
Traverse City Iron Works, Lardie *v*..... 210
Trumbull Motor Car Co. *v.* Wayne Circuit Judge. 554
Truscott Boat Manufacturing Co., Union Banking Co. *v*..... 698

Union Banking Co. *v.* Truscott Boat Manufacturing Co..... 698

Van Buren County Drain Commissioner, Kennedy *v*..... 676
Vandemark, Merriman *v*..... 226
Vinton Co., Dams *v*..... 12
Voorhees *v.* Nelson..... 684
Vosper, Donohue *v*..... 78

Washtenaw Circuit Judge, Gifford *v*..... 546
Wayne Circuit Judge, Trumbull Motor Car Co. *v*.. 554
Weingarden *v.* Folly Theater Co.....220, 225
Western Union Telegraph Co., McPherson *v*..... 471

Digitized by Google

PAGE
Wigent's Estate, *In re*.....507
———, Parmalee *v*..... 507
Williams, Norton *v*..... 69
Wisconsin Chair Co. *v.* Charlevoix Circuit Judge.. 548
Wixson, Jordan *v*..... 288
Wyman, Carlson *v*..... 402

102 CASES.

Digitized by Google

TABLE OF CASES CITED.

PAGE

Abel's Estate, *In re*, 173 Mich. 93..... 513
Adams' Adm'r *v.* L. & N. R. R. Co., 82 Ky. 608..... 282
Alderton *v.* Williams, 139 Mich. 296..... 635
Alward *v.* Board of Supervisors, 187 Mich. 573..... 377
Andres *v.* Circuit Judge, 77 Mich. 85..... 678
Arrol & Co., Ltd. *v.* Kelly, 7 F. 906, 42 Sc. L. 695..... 364
Atkinson *v.* Morse, 63 Mich. 276..... 489
Attorney General *v.* Common Council, 113 Mich. 388..... 414
Attorney General, State, *ex rel.*, *v.* Schweickardt, 109 Mo. 496 27
Auditor General *v.* Ayer, 109 Mich. 694, 122 Mich. 136..... 128
——— *v.* Iron Co., 123 Mich. 521, 132 Mich. 454..... 134
——— *v.* Jenkinson, 90 Mich. 523..... 134
——— *v.* Prescott, 94 Mich. 190..... 134
——— *v.* Railroad Co., 114 Mich. 682, 119 Mich. 682..... 414
——— *v.* Sparrow, 116 Mich. 574..... 128
Aurora Iron, etc., Co. *v.* City of Ironwood, 119 Mich. 325.... 131
Ayres *v.* Board of State Auditors, 42 Mich. 422..... 376

Backus *v.* Cowley, 162 Mich. 592..... 88
Bailey *v.* Bailey, 121 Mich. 236..... 664
Baker *v.* Railroad Co., 169 Mich. 609..... 121
Ballentine *v.* Robinson, 46 Pa. 177..... 440
Baltimore, etc., R. Co. *v.* Mullen, 217 Ill. 203..... 286
Barden *v.* Felch, 109 Mass. 154..... 460
Bardes *v.* Bank, 178 U. S. 524.....703, 704
Barnowsky *v.* Helson, 89 Mich. 523..... 143
Bartle *v.* Railroad Co., 193 N. Y. 362.....281, 283
Beakley *v.* Robert, 120 Mich. 210..... 88
Beath *v.* Chapoton, 115 Mich. 506.....692, 693
Beck's Estate, 225 Pa. 578..... 493
Beith *v.* Porter, 119 Mich. 365..... 231
Belden *v.* Blackman, 118 Mich. 448..... 640
Bender *v.* Circuit Judge, 181 Mich. 50..... 11
Bennett *v.* Butterfield, 112 Mich. 96..... 248
Berka *v.* Woodward, 125 Cal. 119..... 506
Bernard *v.* Traction Co., 188 Mich. 504..... 424
Black *v.* Railroad Co., 146 Mich. 568.....320, 322
Blackburn *v.* Blackburn's Estate, 124 Mich. 190..... 640
Black River Lumber Co. *v.* Warner, 93 Mo. 374..... 440
Bodine *v.* Morgan, 37 N. J. Eq. 426..... 692

Digitized by Google

PAGE

Bouwmeester *v.* Railroad Co., 67 Mich. 87..... 461
Bradley *v.* Board of State Canvassers, 154 Mich. 274..... 379
——— *v.* Railway Co., 107 Mich. 243..... 288
Brady *v.* Railroad Co., 81 Mich. 616..... 61
Braudy *v.* Railway Co., 107 Mich. 100..... 61
Breckenridge *v.* Shrieve, 4 Dana (34 Ky.), 375..... 262
Breen *v.* Hyde, 130 Mich. 1..... 307
Briggs *v.* Briggs, 20 Mich. 34..... 664
——— *v.* Withey, 24 Mich. 136..... 359
Brion *v.* Kennedy, 47 Mich. 499..... 349
Brooks *v.* Cook, 44 Mich. 617..... 201
——— *v.* Leathers, 112 Mich. 463..... 256
Brown *v.* Bryant, 166 Mich. 180..... 142
——— *v.* City of Grand Rapids, 83 Mich. 101..... 131
——— *v.* C., M. & St. P. R. Co., 80 Wis. 162..... 282
——— *v.* Congress & Baker St. Ry., 49 Mich. 153..... 287
———, *In re*, 45 Mich. 326..... 534
Bruggink *v.* Thomas, 125 Mich. 9..... 307
Buchanan *v.* Sahlein, 9 Mo. App. 552..... 692
Bulger *v.* Roche, 28 Mass. (11 Pick.) 36..... 639
Burgess *v.* Stowe, 134 Mich. 204..... 140
Burke *v.* Traction & Electric Co., 147 Mich. 172.....281, 439
Burrell *v.* City of Greenville, 133 Mich. 235..... 122
Byles *v.* Colier, 54 Mich. 1..... 41

Cameron *v.* Culkins, 44 Mich. 531..... 86
Campau *v.* Campau, 44 Mich. 31..... 90
——— *v.* Driving Club, 135 Mich. 575..... 429
Campbell *v.* White, 22 Mich. 178.....31, 32, 34
Canfield *v.* City of Jackson, 112 Mich. 120..... 438
Carver *v.* Sherman, 172 Mich. 264..... 41
Case *v.* Johnson, 91 Ind. 477..... 506
Casterton *v.* Blower Co., 142 Mich. 407..... 142
Cattermole *v.* Circuit Judge, 136 Mich. 274..... 557
Cayuga (The), 59 Fed. 483..... 163
Chapel *v.* Smith, 80 Mich. 100..... 307
Chardavoyne *v.* Galbraith & Co., 81 Ala. 521..... 270
Charlebois *v.* Railroad Co., 91 Mich. 59..... 319
Cheever *v.* North, 106 Mich. 390..... 103
Chicago *v.* Hesing, 83 Ill. 204..... 320
——— *v.* Ward, 169 Ill. 392..... 22
Chicago & N. W. Ry. Co. *v.* Smith, 46 Mich. 504..... 287
Church *v.* City of Portland, 18 Ore. 73..... 22
City of Chicago *v.* Hesing, 83 Ill. 204..... 320
——— *v.* Ward, 169 Ill. 392..... 22
City of Detroit *v.* Patten, 143 Mich. 243..... 414
City of Ensley *v.* Hollingsworth & Co., 170 Ala. 396..... 506
City of Flint *v.* Circuit Judge, 146 Mich. 439..... 557
City of Muskegon *v.* Boyce, 123 Mich. 535..... 134
Clark *v.* North American Union, 179 Mich. 131..... 589
Clement *v.* Mercantile Co., 172 Mich. 243.....358, 359, 692, 695
Coffee *v.* Railroad Co., 139 Mich. 378..... 400
Colborne *v.* Railway, 177 Mich. 139.....299, 300

Digitized by Google

PAGE

Cole *v.* McKey, 66 Wis. 510..... 246
Coleman *v.* Cartage Co., 174 Mich. 231..... 16
Collins *v.* Collins, 2 Ir. R. (1907) 104..... 655
Conrad *v.* Nall, 24 Mich. 275.....32, 33
Consolidated Coal Co. *v.* Board of Trustees, 164 Mich. 235 .....505, 506
Continental, etc., Bank *v.* Emery, 178 Mich. 612.....593-595
Coon *v.* Coon, 163 Mich. 644..... 277
Cooper *v.* Carr, 161 Mich. 405..... 635
——— *v.* Cooper, 162 Mich. 304..... 627
——— *v.* Railway Co., 66 Mich. 261.....319, 320
Cousins *v.* State, 50 Ala. 113..... 263
Cox *v.* Adams, 35 Can. S. C. R. 393..... 642
C. R. & Indiana R. R. *v.* Judson, 34 Mich. 506..... 287
Cranson *v.* Smith, 47 Mich. 189..... 270
——— *v.* Snyder, 137 Mich. 340..... 308
Crawford *v.* Kock, 169 Mich. 372..... 414
Cribbs *v.* Sowle, 87 Mich. 340..... 695
Criswell's Appeal, 41 Pa. 288..... 493
Culligan *v.* Alpern, 160 Mich. 241..... 44

Dallavo *v.* Dallavo, 189 Mich. 350..... 692
Daly *v.* Circuit Judge, 102 Mich. 392..... 11
Daugherty *v.* Thomas, 174 Mich 371..... 246
Davis *v.* Railroad Co., 147 Mich. 479..... 90
Deland *v.* Manufacturing Co., 7 Pick. (Mass.) 244..... 164
Dennis *v.* Dennis, 119 Mich. 380..... 626
Detroit *v.* Patten, 143 Mich. 243..... 414
Detroit City Ry. *v.* Mills, 85 Mich. 634..... 651
Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99..... 609
Detzur *v.* Brewing Co., 119 Mich. 282..... 122
Devaney *v.* Koyne, 54 Mich. 116..... 627
Dikeman *v.* Arnold, 78 Mich. 455..... 86
Dixon *v.* Commissioner of Highways, 75 Mich. 225..... 588
Dodge *v.* Brewer, 31 Mich. 227..... 565
Dorr *v.* Clerk, 7 Mich. 310..... 678
Douglass *v.* Paine, 141 Mich. 485..... 641
Dowd *v.* C., M. & St. P. R. Co., 84 Wis. 116..... 246
Downey *v.* Hendrie, 46 Mich. 498..... 287
Drake, People, *ex rel.*, *v.* Regents of the University, 4 Mich. 98 376
Druck *v.* Lime Co., 177 Mich. 364.....77, 437
Dubois *v.* Riley Township Board, 126 Mich. 587..... 678
Duff *v.* Hutchinson, 57 Hun, 152..... 164
Dunham *v.* Griswold, 100 N. Y. 224..... 692
Dyer *v.* Ice Co., 188 Mich. 203..... 149

East Saginaw Manfg. Co. *v.* City of East Saginaw, 19 Mich. 259. 414
Eaton *v.* Chesebrough, 82 Mich. 214..... 414
Eby's Appeal, 50 Pa. 311..... 493
Ecliff *v.* Railway Co., 64 Mich. 196.....62, 63
Ells *v.* Rector, 32 Mich. 379..... 552

Digitized by Google

PAGE

Ely *v.* Railway, 162 Mich. 287..... 541
England *v.* Railroad, 153 Mass. 490..... 286
Engleken *v.* Hilger, 43 Iowa, 563..... 202
Ensley *v.* Hollingsworth & Co., 170 Ala. 396..... 506
Ervin *v.* Railway & Navigation Co. (C. C.), 27 Fed. 625.... 430
Evans *v.* City of Trenton, 24 N. J. Law, 764..... 668
Ewing *v.* McIntyre, 141 Mich. 506..... 103
Eyster *v.* Gaff, 91 U. S. 521..... 704

Fazakerly *v.* McKnight, 88 Eng. C. L. 795..... 163
Fernette *v.* Railroad Co., 175 Mich. 653..... 539
Field *v.* Sowle, 4 Russ. 112..... 643
Fifelski *v.* Gas Light Co., 181 Mich. 503..... 142
Fike *v.* Railroad Co., 174 Mich. 167..... 77
Fine *v.* Navarre, 104 Mich. 93..... 109
Fisher *v.* Hallock, 50 Mich. 463..... 88
Flanders *v.* Railway Co., 68 Fla. 479..... 540
Fleming *v.* Knitting Mills, 161 N. C. 436..... 460
Fletcher Paper Co. *v.* City of Alpena, 160 Mich. 462, 172 Mich. 35 134
Flint *v.* Circuit Judge, 146 Mich. 439..... 557
Flint & P. M. Ry. *v.* Stark, 38 Mich. 714..... 287
Foerster's Estate, *In re*, 177 Mich. 574..... 103
Folkmire *v.* Railways Co., 157 Mich. 159..... 401
Forrest *v.* O'Donnell, 42 Mich. 556..... 350
Ft. Worth, etc., R. Co. *v.* Stalcup, 167 S. W. 279..... 540
Fraam *v.* Covell, 170 Mich. 366..... 308
Frisbee *v.* Frisbee, 86 Me. 444..... 563
Fuller *v.* City of Grand Rapids, 40 Mich. 395..... 90

Gage *v.* Sanborn, 106 Mich. 269.....562, 563, 565
Gainesville, etc., R. Co. *v.* Vandiver, 141 Ga. 350..... 539
Galinski *v.* Thomas, 178 Mich. 589..... 583
Gallaway *v.* Burr, 32 Mich. 332..... 110
Gardiner *v.* Courtright, 165 Mich. 54.....77, 437
Gardner *v.* Railroad Co., 97 Mich. 240..... 61
Garvie *v.* Hartford, 54 Conn. 440..... 675
Gerard *v.* Ives, 78 Conn. 485..... 493
German Corporation *v.* Aid Society, 172 Mich. 650..... 430
Geyser-Marion Gold Mining Co. *v.* Stark, 106 Fed. 558..... 569
Gibbons *v.* Pemberton, 101 Mich. 397..... 270
Gibbs *v.* Dayton, 166 Mich. 263..... 63
Giddings *v.* Secretary of State, 93 Mich. 1..... 377
Glascock *v.* C. N. O. & Tp. Ry. Co., 140 Ky. 720..... 282
Goddard *v.* Binney, 115 Mass. 450..... 440
Goff *v.* C. R. & M. R. Co., 86 Wis. 245..... 246
Gold *v.* Judson, 21 Conn. 616..... 494
Gold Medal Furniture Co. *v.* Stephenson, 10 D. L. R. (1913) 1 643
Goodenough *v.* Burton, 146 Mich. 50..... 562
Goodnow *v.* Moulton, 51 Iowa, 555..... 572
Gourlay *v.* Insurance Co., 181 Mich. 286..... 385

Digitized by Google

PAGE
Grand Trunk, etc., R. Co. *v.* Lindsay, 233 U. S. 42..... 540
Grand Trunk R. Co. *v.* Circuit Judge, 106 Mich. 248.....556
Grand *v.* Railway Co., 1 B. W. C. C. 17..... 448
Gray *v.* Barton, 62 Mich. 186.....438
Green *v.* Burghardt, 187 Mich. 136..... 470
Greene *v.* Freeholders of Hudson County, 44 N. J. Law, 388 674
Griswold *v.* C. & N. W. R. Co., 64 Wis. 652..... 246
Grostick *v.* Railroad Co., 90 Mich. 594..... 61
Guggenheim *v.* Railway Co., 66 Mich. 150..... 609
Guldin *v.* Schuylkill County, 149 Pa. 210..... 675

Haas *v.* G. R. & Indiana R. R., 47 Mich. 401..... 287
Habitz *v.* Railroad Co., 170 Mich. 71..... 541
Hackley *v.* Headley, 45 Mich. 569..... 692
Haehnle Brewing Co. *v.* Board of Supervisors, 156 Mich. 493 378
Hakes *v.* Thayer, 165 Mich. 476..... 331
Hall *v.* Murdock, 114 Mich. 223.....141, 248
Hamilton *v.* Smith, 39 Mich. 222..... 110
Hanselman *v.* Carstens, 60 Mich. 187..... 581
Hardwick *v.* Bassett, 25 Mich. 149..... 11
Hardy *v.* Mayor and Council of Gainesville, 21 Ga. 327..... 505
Harmon *v.* Harmon, 61 Me. 227..... 692
Harring *v.* Allen, 25 Mich. 505..... 103
Harris *v.* Crawley, 170 Mich. 381..... 63
Hartley *v.* Miller, 165 Mich. 115..... 246
Hascall *v.* Brooks, 105 Mich. 383..... 349
Hayden *v.* Township of Bangor, 182 Mich. 601..... 587
Haynes *v.* Quay, 134 Mich. 229..... 440
Heenrich *v.* Car Co. (D. C.), 20 Fed. 100..... 460
Heikkala *v.* Isaacson, 178 Mich. 176..... 201
Henderson *v.* Railway Co., 116 Mich. 368.....62, 466
Henry *v.* Lake Shore & M. S. Ry., 49 Mich. 495..... 287
Henson *v.* Beckwith, 20 R. I. 165..... 248
Hewlett *v.* L. & N. R. R. Co., 15 Ky. Law Rep. 178..... 282
Hirschkorn *v.* Desk Co., 184 Mich. 239.....519, 520
Hodge *v.* Gray, 110 Mich. 654..... 270
Hoffman *v.* Loud, 111 Mich. 156..... 517
——— *v.* Simpson, 121 Mich. 502..... 88
Hogarty *v.* Railway Co., 245 Pa. 443.....540
Holler *v.* Ross, 68 N. J. Law, 324..... 461
Hope, *In re*, 48 Mich. 518..... 103
Hosley *v.* Holmes, 27 Mich. 416..... 627
Houlihan *v.* Fogarty, 162 Mich. 492..... 92
Hourtienne *v.* Schnoor, 33 Mich. 274..... 86
Howe *v.* Newmarch, 12 Allen (Mass.), 49..... 462
Howells *v.* Vivian & Sons, 85 L. T. 529..... 364
Hoyt *v.* Hoyt, 56 Mich. 50..... 664
Huntington *v.* Gault, 81 Mich. 144..... 109
Hurst *v.* Railway, 84 Mich. 539..... 319
Hyde *v.* Baldwin, 17 Pick. (Mass.), 303..... 164

Digitized by Google

PAGE

In re Abel's Estate, 173 Mich. 93..... 513
——— Asa B. Brown, 45 Mich. 326..... 534
——— Estate of Leonard, 95 Mich. 295..... 534
——— Foerster's Estate, 177 Mich. 574..... 103
——— Guardianship of Storick, 64 Mich. 685..... 534
——— Hope, 48 Mich. 518..... 103
——— Lambie's Estate, 97 Mich. 50..... 103
——— Lambrecht, 137 Mich. 450..... 90
——— Meeker's Estate, 169 Mich. 303..... 106
——— Reidy's Estate, 164 Mich. 167..... 506
——— Williams' Estate, 106 Mich. 490..... 513
Island Mill Lumber Co. *v.* City of Alpena, 176 Mich. 575.... 131

Jackson *v.* Stackhouse, 1 Cow. (N. Y.) 122..... 163
Jacobs *v.* Trust Co., 155 Mich. 233..... 414
Janik *v.* Motor Co., 180 Mich. 557..... 246
Johnson *v.* Johnson, Walk. Ch. 331..... 562
——— *v.* Van Velsor, 43 Mich. 208..... 86

Keith *v.* Wendt, 144 Mich. 49.....378, 379
Kemp *v.* Cossart, 47 Ark. 62..... 572
Knickerbocker *v.* Railway Co., 167 Mich. 596.....62, 466
Koons *v.* Vauconsant, 129 Mich. 260..... 695
Kozlowski *v.* Railway, 174 Mich. 412..... 610
Kwiotkowski *v.* Railway Co., 70 Mich. 549..... 61

La Fernier *v.* Lighter & Wrecking Co., 129 Mich. 596..... 143
Lake Shore, etc., R. Co. *v.* Bangs, 47 Mich. 470..... 288
Lamb *v.* Jeffrey, 41 Mich. 719..... 563
Lambie's Estate, *In re*, 97 Mich. 50..... 103
Lambrecht, *In re*, 137 Mich. 450..... 90
Lasley *v.* Delano, 139 Mich. 602..... 6
Lau *v.* Railway Co., 120 Mich. 115..... 61
Lawyer *v.* Smith, 8 Mich. 412..... 103
Layne *v.* Railway Co., 66 W. Va. 607.....459, 460
Leake *v.* Watson, 60 Conn. 498..... 494
Lee *v.* Clary, 38 Mich. 223..... 88
Leonard *v.* Leahy, 169 Mich. 406..... 439
Leonard's Estate, *In re*, 95 Mich. 295..... 534
Levyn *v.* Koppin, 183 Mich. 232.....292, 293
Lewis *v.* Doyle, 182 Mich. 141..... 695
Lieblien *v.* Hansen, 178 Mich. 11..... 563
Lincoln *v.* Railway Co., 179 Mich. 189..... 143
Line *v.* Railway Co., 143 Mich. 163..... 609
Lingham *v.* Eggleston, 27 Mich. 324..... 41
Livingstone *v.* Plate Glass Co., 146 Mich. 236..... 682
Louisville, etc., R. Co. *v.* Moore, 150 Ky. 692.....281, 282
Lyall *v.* Edwards, 6 Hurl. & N. 336..... 163
Lyon *v* Circuit Judge, 37 Mich. 377..... 386
Lyons *v.* Yerex, 100 Mich. 214..... 494

McCoy *v.* Screw Co., 180 Mich. 454.....517, 518
McDonald *v.* Casey, 84 Mich. 505..... 202

Digitized by Google

PAGE

McDowd *v.* Circuit Judge, 41 Mich. 551..... 562
McGary *v.* Motor Co., 182 Mich. 345..... 77
McGee *v.* Railway Co., 102 Mich. 107..... 61
McKenna *v.* Crowley, 16 R. I. 364..... 270
McRae *v.* Lumber Co., 102 Mich. 488..... 106
McSloy *v.* Ryan, 27 Mich. 110..... 524
Magar *v.* Hammond, 183 N. Y. 387.....459, 460
Main Colliery Co., Ltd. *v.* Davies, 2 W. C. C. 108..... 364
Mannel *v.* Railway, 139 Mich. 106..... 651
Manos *v.* Railway, 168 Mich. 155..... 300
Marx *v.* King, 162 Mich. 258..... 487
Matteson *v.* Vaughn, 38 Mich. 373..... 87
Maxwell *v.* Bridge Co., 46 Mich. 278..... 90
May *v.* Board of Canvassers, 94 Mich. 505.....378, 379
Mearns *v.* Railroad Co., 163 N. Y. 108..... 283
Meeker's Estate, *In re*, 169 Mich. 303..... 106
Menard *v.* Campbell, 180 Mich. 583..... 494
Merrill *v.* Humphrey, 24 Mich. 170..... 134
Messenger *v.* Peter, 129 Mich. 93..... 88
Mich. Cent. R. R. *v.* Coleman, 28 Mich. 440..... 287
Michigan, etc., R. Co. *v.* Vreeland, 227 U. S. 59.....540, 545
Michigan Mutual Fire Ins. Co. *v.* Circuit Judge, 112 Mich. 270 .....556, 557
Mikkola *v.* Circuit Judge, 165 Mich. 583.....547, 557
Milford Borough *v.* Water Co., 124 Pa. 610..... 506
Miller *v.* City of Detroit, 156 Mich. 630..... 587
——— *v.* Railway, 125 Mich. 171..... 651
Miner *v.* Ice Co., 93 Mich. 97..... 430
Minock *v.* Railway Co., 97 Mich. 425..... 288
Mirabile *v.* Simon J. Murphy Co., 169 Mich. 522..... 141
Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570..... 540
Mitchell *v.* Railway Co., 51 Mich. 236..... 286
Mitchinson *v.* Day Bros., 6 B. W. C. C. 190..... 655
Mollica *v.* Railroad Co., 170 Mich. 96.....63, 466
Moore *v.* Nation, 80 Kan. 672..... 668
——— *v.* Smith, 95 Mich. 71..... 565
Morris *v.* Railroad Co., 127 La. 446..... 283
Mouat *v.* Hildebrand, 15 Colo. 382..... 162
Muskegon *v.* Boyce, 123 Mich. 535..... 134

National Surety Co. *v.* Grant, 177 Mich. 348.....439
Nedby *v.* Nedby, 5 De G. & Sm. 377..... 642
Nelson *v.* Leszczynski-Clark Co., 177 Mich. 517..... 695
New Ellerslie Fishing Club *v.* Stewart, 123 Ky. 8..... 462
Nicholas *v.* Nicholas, 50 Mich. 162..... 664
Nunemacher *v.* City of Louisville, 98 Ky. 334..... 506

O'Blinskie *v.* Circuit Judge, 34 Mich. 62..... 552
Olin *v.* Henderson, 120 Mich. 149..... 371
Oliver *v.* Railway Co., 134 Mich. 367..... 541
Osten *v.* Jerome, 93 Mich. 196.....307
Otto *v.* Railroad Co., 189 Mich. 463..... 63

Digitized by Google

PAGE

Palmer *v.* Corbin, 1 Root (Conn.), 271 164
——— *v.* Palmer, 45 Mich. 150 664
——— *v.* Railroad Co., 56 Mich. 1 400
Pape *v.* Township of Benton, 140 Mich. 165 115
Parsons *v.* Bills, 163 Mich. 415 371
——— *v.* Railway Co., 94 Mo. 286 320
Partello *v.* Holton, 79 Mich. 372 535
Patterson *v.* Hemenway, 148 Mass. 94 248
Paul *v.* Circuit Judge, 169 Mich. 452 378
Peake *v.* Buell, 90 Wis. 508 246
Pearl *v.* Township of Benton, 136 Mich. 697 106
Pegg *v.* Pegg, 165 Mich. 228 469
Pellow *v.* Iron Co., 164 Mich. 87 88
Peninsula Iron, etc., Co. *v.* Township of Crystal Falls, 60 Mich. 510 131
People *v.* Averill, 179 Mich. 224 619
——— *v.* Dunston, 173 Mich. 368 275
——— *v.* Everts, 112 Mich. 194 420
——— *v.* Giddings, 159 Mich. 523 419
——— *v.* Hancock, 166 Mich. 654 419
——— *v.* Neumann, 85 Mich. 98 618
——— *v.* Railway Co., 92 Mich. 522 651
——— *v.* Rice, 103 Mich. 350 420
———, *ex rel.* Drake, *v.* Regents of the University, 4 Mich. 98 376
———, *ex rel.* Russell, *v.* Inspectors and Agent of the State Prison, 4 Mich. 187 376
Peppett *v.* Railroad Co., 119 Mich. 640 142
Perego *v.* Railway Co., 158 Mich. 225 ..... 62, 466
Perrin *v.* Railroad Co., 36 N. Y. 120 27
Petaja *v.* Mining Co., 106 Mich. 463 682
Peters *v.* Cartier, 80 Mich. 124 88
Pfirrman *v.* Wattles, 86 Mich. 254 88
Phillips *v.* Township of New Buffalo, 68 Mich. 217 90
Pierce *v.* Parker, 4 Metc. (Mass.) 80 164
Pioneer Iron Co. *v.* City of Negaunee, 116 Mich. 430 131
Power *v.* City of Detroit, 139 Mich. 30 131
Powers *v.* Lumber Co., 43 Mich. 468 563
Preger *v.* Barnett, 175 Mich. 494 552
Preston *v.* City of Boston, 12 Pick. (Mass.) 7 692
Price *v.* Inhabitants of City of Plainfield, 40 N. J. Law, 613 .. 27
——— *v.* Stagray, 68 Mich. 17 588
Prindle *v.* Allen, 164 Mich. 553 257
Purdy *v.* City of Sault Ste. Marie, 188 Mich. 573 454

Rajnowski *v.* Railroad Co., 74 Mich. 20 ..... 319, 320
Rand *v.* Butler, 48 Conn. 293 494
Rankin *v.* Crane, 104 Mich. 6 109
Rathbone *v.* Wirth, 150 N. Y. 459 671
Redding *v.* Railroad Co., 3 S. C. 1 460
Redfield *v.* Redfield, 75 Iowa, 435 151
Reed *v.* Insurance Co., 95 U. S. 23 163
Reget *v.* Bell, 77 Ill. 593 202

Digitized by Google

PAGE

Reidy's Estate, *In re*, 164 Mich. 167..... 506
Rich *v.* Lord, 18 Pick. (Mass.) 322..... 163
——— *v.* Mining Co., 147 Fed. 380..... 91
Richter *v.* Harper, 95 Mich. 221..... 611
Riley *v.* Roach, 168 Mich. 294..... 246
Ritze *v.* Board of Canvassers, 172 Mich. 423..... 379
Robards *v.* Pipe Co., 130 Ky. 380..... 462
Robinson *v.* Railroad Co., 79 Mich. 328..... 401
——— *v.* Telegraph Co., 169 Mich. 503..... 476
——— *v.* Wright & Co., 94 Mich. 283..... 142
Rosecrants *v.* Shoemaker, 60 Mich. 4.....201, 202
Rounds *v.* Railroad Co., 64 N. Y. 129.....460, 462
Rowe *v.* Rand, 111 Ind. 206..... 163
Ruggles *v.* Randall, 70 Conn. 44..... 494
Russell, People, *ex rel.*, *v.* Inspectors and Agent of the State Prison, 4 Mich. 187..... 376

St. Louis, etc., R. Co. *v.* Craft, 237 U. S. 648..... 543
——— *v.* Welch, 72 Tex. 298..... 448
Sammon *v.* Wood, 107 Mich. 506..... 513
Sanborn Co. *v.* Alston, 153 Mich. 456..... 572
Sauer *v.* Construction Co., 179 Mich. 618.....579, 580
Schelowski *v.* Pawlowski, 168 Mich. 664..... 270
School District *v.* Snell, 24 Mich. 350..... 553
Sciolaro *v.* Asch, 198 N. Y. 77.....244, 245
Seymour & Co. *v.* Butler, 8 Iowa, 304..... 163
Sharp *v.* Railroad Co., 184 N. Y. 100.....459, 460
Shawhan *v.* Van Nest, 25 Ohio St. 490..... 440
Sheldon *v.* Railroad Co., 161 Mich. 503.....371, 372
Sheldon, Kamm & Co. *v.* Bremer, 166 Mich. 578..... 337
Sherburne *v.* Goodwin, 44 N. H. 271..... 164
Shoninger Co. *v.* Mann, 219 Ill. 242..... 244
Shufelt *v.* Railroad Co., 96 Mich. 329..... 401
Silverstone *v.* Assurance Corporations, 187 Mich. 333..... 77
Simmons *v.* Johnson, 3 Barn. & Adol. 175..... 164
——— *v.* White Bros., 80 L. T. 344, 1 W. C. C. 89..... 364
Skilton *v.* Codington, 185 N. Y. 80..... 704
Slater *v.* Walter, 148 Mich. 650..... 109
Slocomb *v.* Thatcher, 20 Mich. 52..... 553
Smith *v.* City of Waterbury, 54 Conn. 174..... 674
——— *v.* Hamilton, 20 Mich. 433..... 371
——— *v.* Humphrey, 20 Mich. 398..... 90
——— *v.* Railroad Co., 210 Fed. 761..... 540
——— *v.* Township of Eaton, 138 Mich. 511..... 308
——— *v.* Wheeler, 7 Or. 49..... 440
——— *v.* Winsor, 239 Ill. 567..... 494
Snyder *v.* Lumber Co., 135 Mich. 31..... 599
——— *v.* Railway Co., 131 Mich. 418.....319, 320
Solly *v.* Forbes, 4 Moore, 488..... 163
Solomon *v.* Railway Co., 103 N. Y. 437..... 284
——— *v.* Township of Oscoda, 77 Mich. 365..... 134
South Covington, etc., R. Co. *v.* Cleveland, 30 Ky. Law Rep. 1072 462

Digitized by Google

PAGE

Spalding *v.* Lowe, 56 Mich. 366..... 110
Spencer *v.* Johnson, 185 Mich. 85..... 150
Stansell *v.* Corning, 21 Mich. 242..... 552
State, *ex rel.* Attorney General, *v.* Schweickardt, 109 Mo. 496 27
Stephenson *v.* G. T. R. Co., 34 Mich. 323..... 287
Stevens *v.* Rose, 69 Mich. 259..... 176
Stevenson *v.* Railway Co., 118 Mich. 651..... 106
Stitt *v.* Protective Ass'n, 177 Mich. 207..... 37
Stoll *v.* Laubengayer, 174 Mich. 701..... 120
Storick, *In re* Guardianship of, 64 Mich. 685..... 534
Storrie *v.* Elevator Co., 134 Mich. 297..... 541
Strepanski *v.* Plaster Co., 162 Mich. 696..... 683
Stuart *v.* Bank of Montreal, 41 Can. S. C. R. 516..... 642
Sullivan *v.* Modern Brotherhood, 167 Mich. 524..... 518
Swinburne *v.* Swinburne, 36 R. I. 255..... 163
Sword *v.* Keith, 31 Mich. 247..... 513

Talbot *v.* Van Boris, 1 K. B. (1911) 854..... 643
Taylor *v.* Taylor, 232 U. S. 363..... 544
Ten Eyck *v.* Railroad Co., 74 Mich. 226..... 429
Thatcher *v.* St. Andrew's Church, 37 Mich. 264..... 570
The Cayuga, 59 Fed. 483..... 163
Thomas *v.* Abbott, 105 Mich. 687..... 378
——— *v.* Dansby, 74 Mich. 398..... 202
Tobias *v.* Railroad Co., 103 Mich. 339..... 401
Toomey *v.* Iron & Steel Works, 89 Mich. 249..... 142
Tower *v.* Welker, 93 Mich. 332..... 678
Township of Merritt *v.* Harp, 131 Mich. 174, 141 Mich. 233... 307
Trudell *v.* Railway Co., 126 Mich. 73.....62, 466
Turner *v.* Burr, 141 Mich. 106..... 494
Tuthill *v.* Katz, 163 Mich. 618..... 338
Tyler Lumber Co. *v.* Charlton, 128 Mich. 299..... 41

United States *v.* King, 147 U. S. 676..... 668

Vandalia R. Co. *v.* Stringer, 182 Ind. 676..... 540
Van Slyke *v.* Rooks, 181 Mich. 88..... 11

Walker *v.* Cady, 106 Mich. 21..... 231
——— *v.* Schultz, 175 Mich. 280..... 88
Walsh *v.* King, 74 Mich. 350..... 134
Walters *v.* Railway Co., 113 Wis. 367.....281, 282
Ward *v.* Culver, 144 Mich. 57..... 378
Webster *v.* Canning Co., 149 Mich. 489..... 429
Weil *v.* Railway, 186 Mich. 614..... 63
Weingarden *v.* Folly Theatre Co., 189 Mich. 220..... 225
Welch *v.* Brainard, 108 Mich. 38..... 682
Wells Estate *v.* Church, 63 Vt. 116..... 413
West *v.* Railway, 159 Mich. 269..... 541
Western Union Telegraph Co. *v.* Fenton, 52 Ind. 1..... 476
Wheatley *v.* State, 79 Tenn. 262..... 262
Whipple *v.* Parker, 29 Mich. 369..... 162

Digitized by Google

PAGE

Whitcomb *v.* Railway, 125 Mich. 572..... 142
——— *v.* Whitney, 24 Mich. 486.....41, 440
White *v.* Campbell, 25 Mich. 463..... 32
Whitney *v.* Wenman, 198 U. S. 539..... 703
Wilbur *v.* Railroad Co., 145 Mich. 344..... 106
Wiley *v.* Lovely, 46 Mich. 83.....553
Williams *v.* City of Saginaw, 51 Mich. 120..... 131
Williams Bros. *v.* Hanmer, 132 Mich. 635.....563
Wilson *v.* Bowen, 64 Mich. 133.....110
——— *v.* Davis, 1 Mich. 156..... 349
——— *v.* Royal Neighbors of America, 139 Mich. 423..... 592
Wingert *v.* Circuit Judge, 101 Mich. 395..... 540
Winoker *v.* Warfield, 136 Ga. 742..... 460
Wood *v.* Smith, 162 Mich. 334..... 257
Wright *v.* Crane, 142 Mich. 508..... 609
——— *v.* Knapp, 183 Mich. 656..... 469

Yale State Bank *v.* Fletcher, 173 Mich. 585.....678
Yelverton *v.* Steele, 40 Mich. 538..... 90

Zeigler *v.* Coal Co., 150 Mich. 82..... 88
Zoltovski *v.* Gzella, 159 Mich. 620..... 62

Digitized by Google

LAWS CITED AND CONSTRUED.

UNITED STATES STATUTES.

	PAGE
14 U. S. Stat. 80	81
25 U. S. Stat. 1008	81, 82
35 U. S. Stat. 65	538, 541, 542
36 U. S. Stat. 291	538, 542
U. S. Comp. Stat. 1901, § 1044	693
U. S. Comp. Stat. 1913, § 8657	542, 544
—— § 8665	542

CONSTITUTION OF MICHIGAN.

	PAGE
(1850) Art. iv, § 21	672
—— Schedule, § 20	670, 672
(1909) Art. xvi, § 3	668, 669, 672

COMPILED LAWS 1897.

	PAGE
§§ 436	269, 271
672	547
713	346, 348, 562
2342	678
2471	114
3323	127
3725	378
3830, subd. 5	312
3899	128, 131
3922	128
4040	180
4371	71
5398	198
8686, 8687	273
8709	533
8839, subd. 5, 8844	569
§§ 8845, 8848	570
8988	89
9167	469
9268	102
9361	561, 564
9363	231
9509	6
9728, 9736	32
9990	562
10117	541
10265	552
10427	309, 541
10428	309
10504	104
10714	336
11143	563

HOWELL'S STATUTES (2D ED.).

	PAGE
Vol. 1, § 953	114
—— § 1835	95
—— § 1870	94, 128
Vol. 2, §§ 2174-2179, 2193, 2462	588
Vol. 2, § 3428	71
—— § 5074	198
—— § 5853	127
Vol. 4, §§ 10679, 10684	569
—— §§ 10685, 10688	570

Digitized by Google

HOWELL'S STATUTES (2D ED.)—Continued.

	PAGE
Vol. 4, § 10981	102
—— § 11072	561, 564
—— § 11074	231
—— §§ 11534, 11535	273
—— § 11565	533
—— § 11847	552
Vol. 5, § 12120	547
—— §§ 12169, 12653	562
—— §§ 12761, 13702	541
—— § 13938	563
—— §§ 14135, 14143	32

SESSION LAWS.

	PAGE
1889, Act 207	416
—— Act 243	273
1893, Act 134	106
1897, Act 173, § 2	115
—— Act 254, chap. 7, § 2	72, 73
—— —— —— § 3	72
—— —— —— § 8	71
—— —— chap. 8	71, 72
1903, Act 232	426
—— —— § 12	595
1905, Act 265, §§ 54, 58, 59	328
—— Act 331	494
1907, Act 46, § 1	170
—— —— § 2	171
—— Act 101	260
—— (Extra Session), Act 4	378
1909, Act 104	538, 541
—— Act 118, chap. 3, § 2	72, 73
—— Act 160	619
—— —— § 2	614, 617
—— Act 281	379
1909, Act 286	494
—— Act 307	458, 463, 683
1911, Act 174	412, 413
—— Act 185	71, 677
—— —— chap. 3	72, 73
—— Act 202	678
—— —— §§ 1, 2	679
1912 (Extra Session), Act 10	424, 443, 653
—— —— —— pt. 2, § 10	519
—— —— —— —— §§ 15, 16, 18	454
—— —— —— pt. 3, § 12	446
1913, Act 100, § 15, subds. 1, 3, 6	342
—— Act 164	260, 264
—— Act 320	380
—— Act 327	380
—— —— §§ 2, 3	381
—— Act 331	668
—— —— § 1	667
—— Act 352	379
1915, Act 142	595
—— Act 199	89

CIRCUIT COURT RULES.

	PAGE
No. 26	553
No. 26b	552

CHANCERY RULE.

	PAGE
No. 12	10

Digitized by Google

Digitized by Google

OCTOBER TERM, 1915.*

PRENTIS *v.* PRENTIS.

1. QUIETING TITLE—PAROL AGREEMENTS—EQUITY—TRUSTS.

Where complainants brought a suit to quiet title to store property in Detroit that defendants averred and gave testimony to show had been conveyed in trust to complainant charged with the obligation to pay over to his two brothers such sums of money as they might need, and where the claimed trust had been recognized by complainant who had paid considerable sums to the brothers from time to time, and who later voluntarily executed a quit-claim deed to one of the sisters-in-law, the conveyance being intended for the purpose of enabling her husband to borrow money and with the oral arrangement that it should be reconveyed to the grantor (afterwards carried out), and, where it further appeared that the grantee quit-claimed said premises to a son, who also found a blank deed from the first grantor, and filling up the spaces, recorded it so as to clear up title in his mother, the trial court properly treated the deeds from the sister-in-law to her son as void, and rightly found defendant to be the owner in fee, the complainants failing to produce evidence that would preponderate in their favor, and hence not sustaining the burden of proof resting upon them.

2. SAME—STATUTE OF FRAUDS.

Under section 9509, 3 Comp. Laws, performance of the alleged oral agreement sufficiently met any objection as to the invalidity of the trust because it was not in writing; if the executory arrangement was fully carried out by the parties, no sufficient reason existed to invalidate their acts by reason of the statute of frauds aforesaid.

3. SAME—EVIDENCE.

Held, further, that the grant of title by the wife of one of

*Continued from Vol. 188.

Digitized by Google

the brothers to her husband was understandingly executed and that she knew the purpose was to permit him to mortgage the property.

4. SAME.

And the evidence failed to meet the burden of proof upon the contention that equitable title rested in the three brothers, two of whom received unequal shares of the rent, and paid taxes jointly; having but a tendency to show a beneficial use, not an equitable right in the real estate.

Appeal from Wayne; Van Zile, J. Submitted June 10, 1915. (Docket No. 39.) Decided December 21, 1915.

Bill by John H. Prentis and another against George H. Prentis and others to quiet title to certain real property. From a decree for defendants, complainants appeal. Affirmed.

Henry B. Graves and *Arthur E. Fixel,* for complainants.

George H. Prentis, in *pro. per.*

George G. Prentis and *Benjamin F. Mulford* (*James O. Murfin,* of counsel), for defendant John F. Prentis.

KUHN, J. The bill of complaint in this case was filed to quiet the complainants' alleged title to certain real estate in Detroit, which was formerly the homestead of Eben Prentis, and is now occupied by Himelhoch Bros. & Co.'s store on Woodward avenue, in the heart of the business section of Detroit.

Eben Prentis died in October, 1868, leaving three sons, John F., George H., and Browse T. The first two named sons are the principal defendants in this suit, and the widow of Browse, Mary, and their son John H. (called Jack) are the complainants. The defendants Wayne County & Home Savings Bank and the Mutual

Digitized by Google

Benefit Life Insurance Company hold mortgages on the property, and Himelhoch Bros. & Co. hold a lease; but their interests are not adversely affected in this litigation, and they are therefore merely nominal parties.

On July 15, 1862, Eben Prentis conveyed the property to his son John F. by warranty deed. The defendants contend, and presented testimony in support of their claim, that at the time this conveyance was made it was understood between Eben and John F., who had no business of his own, that he was to give to his brothers money whenever they wanted it. It is the contention of complainants that this deed was given in trust for all three sons. On June 21, 1889, John F. gave to Mary, the wife of Browse, a quitclaim deed of the property—defendants say at the solicitation of Browse, who wished to borrow money on it, and assured John F. that he should have the property back. Complainants say that this deed was given to Mary in trust for the three brothers, because foreclosure proceedings were pending against other property of John F. On April 9, 1891, Mary conveyed the property to Browse by warranty deed, which was recorded June 17, 1907, and on June 15, 1907, Browse conveyed the property to John F. by warranty deed, and on January 12, 1912, Mary quitclaimed to John F. The defendants say that this latter deed was in fulfillment of the plan by which the title originally vested in Mary. Complainants say it was procured by representations that it was needed to complete arrangements for a new building, for which Himelhoch Bros. & Co. were to make advances of rent, and John F. and George H. borrowed $35,000 on a mortgage given to the Wayne County & Home Savings Bank.

On July 25, 1904, Jack Prentis received from his mother a warranty deed of the premises. Browse T. Prentis died May 4, 1912, devising all his property to his wife first, and to his son Jack if his wife should

Digitized by Google

predecease him. After his father's death, Jack found among his papers a blank deed signed by John F. Prentis and acknowledged in blank before a notary public whose commission had expired in 1911. He filled up the blanks in the deed by inserting a description of the property here in suit, the date January 15, 1912, and the name of Mary Prentis as grantee, leaving the acknowledgment in blank. The witnesses were Jack Prentis and the notary. The real date of the deed is in dispute, as well as the purpose of it. It is the contention of the complainants that it was left with Browse shortly after the recording of the deed of Mary to Browse and Browse to John F., "for the purpose of protecting his branch of the family in their interests in the property." It is the contention of the defendants—and they presented the testimony of the notary and John F. to prove it—that it was given to enable Browse to sell some property on Crane avenue, owned by John F. and Browse, while John F. was in Florida for the winter. After the discovery of this blank deed, and before filling in all the blanks, Jack consulted his attorney, Mr. Fixel, upon whose advice he secured another warranty deed from his mother on October 28, 1913, and recorded it at once to protect his claimed rights. The deed of July 25, 1904, from Mary to Jack Prentis had not been recorded, for the reason, as given by Jack, that he did not wish to have his father know of its existence. Complainants in this suit, however, rest no claim of title on this blank deed, and say that it was only used "to bring George H. Prentis into the light," whom the complainants charged with machinations to get control of the property. Jack Prentis and Mr. Fixel interviewed the notary about the blank deed, and on the next day, when the notary told George H. about the interview, George H. placed on record a warranty deed from John F. to himself, dated December 18, 1913.

Digitized by Google

Mortgages were issued on the property from time to time by John F. prior to April 9, 1891, the date of the deed to Mary, and by Mary and Browse T. after that date; and the proceeds were shared by the brothers, principally by George H. and Browse T. Leases which had been negotiated by Browse, between 1891 and 1907, were made in the name of John F. Prentis, and one was signed in 1895, "John F. Prentis, by Browse T. Prentis, his attorney." Rents were collected at times by Browse, and after his death by Jack, and receipts given, in the name of John F., and John F. made a division of the rents with his brothers. During all this time John F. usually collected the rents in person.

The bill prays that the deeds of Mary to Browse (April 9, 1891), Browse to John F. (June 15, 1907), and John F. to George H. (December 18, 1913), be set aside as clouds upon the title of Jack Prentis, and that John F. give a quitclaim deed to discharge any right, title, and interest appearing of record to have been conveyed to him by the quitclaim deed of Mary Prentis of January 12, 1912.

The trial judge found for the defendants, dismissing the bill of complaint and granting the relief prayed for by George H. Prentis in his cross-bill by declaring the two deeds by Mary to Jack Prentis void and adjudging George H. Prentis to be the owner in fee simple of the premises.

It is impossible, in a reveiw of this case, to attempt to set forth in an opinion the many incidents found in the record which show the unusual business relations which existed during many years between the parties to this litigation. But after a careful study of this record we are firmly of the opinion that there are at least as many things consistent with the theory of legal title in the defendant George H. Prentis as in the complainants. Complainants' case must therefore fail, as

Digitized by Google

they have not met the burden which rests upon them to prove their case.

In our opinion, the theory of the defendants with reference to the deed of John F. to his sister-in-law Mary, given in 1889, is the only reasonable explanation which can be given for this transfer. It seems to carry out the theory of the original understanding between John F. and his father, and that its purpose was to permit Browse to raise money on it is clearly evidenced by the fact that he did thereafter secure funds by giving a mortgage.

It is contended that no evidence of a parol trust or parol condition is competent under the statute of frauds (section 9509, 3 Comp. Laws). But while there can be no question that a title cannot be established by parol evidence, we think that this testimony was proper to explain the voluntary conveyance had with reference to this property, and to show why Mary Prentis received her deed, and why she conveyed it to Browse, and in 1912 quitclaimed to John F. If she had not reconveyed, it is clear that the testimony would not have established a trust in favor of the defendants; but here the transaction was completed and the parol agreement fully executed, and therefore the statute of frauds has no application, under the authority of *Lasley* v. *Delano,* 139 Mich. 602 (102 N. W. 1063), where this court said:

"Neither the statute of frauds, nor that of uses and trusts, applies to this case. The parol contract between complainant and Mr. Delano has been performed, and the parol trust imposed upon him fully executed. No contract for the sale of lands is involved. * * * If, however, the trust rested in parol, and while so resting could not be enforced as an executory contract, yet, when the parol agreement has been executed, neither party can invoke the statute. The courts have repeatedly held that a party may perform a promise which he could not legally be compelled to

Digitized by Google

perform, and that, when so performed, it is binding upon him and the other party to it."

It was so considered, we think, by counsel, and we are also of the opinion that the most important question in controversy in the case is the validity of the deed of April 9, 1891, given by Mary Prentis to Browse T. Prentis. With reference to this deed the learned circuit judge made the following finding, with which conclusion, after a careful examination of her testimony, we concur:

"Now the court finds as a matter of fact that there was no fraud inducing the execution of this deed from Mary Prentis to her husband, Browse T. Prentis, and that she understood fully the purpose of that deed; that she understood it not only by reason of the understanding that had been had, of which she was fully conversant, but had seen that deed; it was written in her own handwriting, and executed; and the proofs show and warrant the statement that this title was simply handed to Mary Prentis to be used as directed by Browse Prentis, for his benefit, in raising some money, and for the making of this mortgage and some other mortgages; and that it was understood that it was to be returned to John F. Prentis. Browse T. Prentis did, after having received this deed from Mary Prentis, keep it off the record a short time to be sure, but Browse T. Prentis, on the 15th of June, 1907, to comply with this promise he had made to his brother, deeded the property back to John F. Prentis, and later, by way of confirming the title of January 12, 1912, Mary Prentis quitclaimed to John F."

With reference to the contentions of the complainants that the property was beneficially owned by the three brothers, each having an equitable interest, and that the interest of Browse T. Prentis passed by the will to the complainants, it must be said that the evidence in support thereof is very meager, if not negligible. There is no dispute about the validity of the deed of Eben Prentis to John F., which vested the title ex-

Digitized by Google

clusively in John F. The only competent evidence in support of the theory that there was an equitable title in all the brothers was the fact that they all shared in the proceeds of the rent and mortgages, and divided the taxes between them. But it can be said, with force we believe, that this fact was entirely in accord with the defendants' contention as to the understanding which accompanied the giving of the deed, and is proof of John F.'s faithful performance of his father's request. The very irregular division of the proceeds and the taxes tends to substantiate the evidence of the understanding that John F. was to give his brothers money when they needed it, as was also the fact that the arrangement did not seem to become very definite until 1902 or 1903. As the years went by the brothers seemed to share the property and its proceeds on a more and more definite basis, and they apparently had an understanding that each was to have a part of the proceeds and therefore each should help pay the obligations. But if the property were beneficially *owned* by all three, not beneficially *used*, it is inconceivable that there would have been such an indefinite, haphazard, uneven division of the profits.

Complainants having failed in their case, we conclude that the decision of the court below should be affirmed, and that a decree should be entered as prayed by the defendants in the cross-bill, with costs to the defendants.

BROOKE, C. J., and STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

BLODGETT v. KENT CIRCUIT JUDGE.

EQUITY—PRACTICE—REPLICATION—EXTENDING TIME.

Chancery Rule 12, fixing the time within which a replication may be filed at fifteen days, recognizes in the chancellor a discretion to extend the time: hence, it was not incorrect practice, on defendant's motion to strike a replication from the files, to deny the request, leaving the replication on file as if properly entered by permission of court after the time stated in the rule, the court being expressly authorized to extend the time thereby.

Submitted October 5, 1915. (Calendar No. 26,834.) Decided December 21, 1915.

Mandamus by John W. Blodgett against John S. McDonald, one of the circuit judges for the county of Kent, to require respondent to vacate his order denying the motion of petitioner to strike from the files the replication of the Grand Rapids Trust Company, as trustee, in a chancery proceeding in which petitioner is one of the defendants. Writ denied.

Norris, McPherson, Harrington & Waer, for relator.

Thos. P. Bradfield, for respondent.

MOORE, J. On or about September 11, 1914, there was commenced a suit in chancery wherein the Grand Rapids Trust Company, as trustee of the Grand Rapids Motor Truck Company, was complainant, and in which John W. Blodgett, together with numerous other parties, was a defendant. On October 6, 1914, Mr. Blodgett's answer to the bill of complaint was filed and served. The answers of many of the other defendants were not served until some months thereafter. After the filing and service of Mr. Blodgett's answer, no rep-

Digitized by Google

lication was filed for more than five months. Immediately upon the receipt of this replication Mr. Blodgett, by his solicitors, filed a motion to strike from the files this replication on the ground that it was not filed within 15 days after the filing and serving of the answer. This motion was denied, and at a later date a motion to vacate the order thereupon entered was also denied. This petition for mandamus asks for an order directing the circuit judge to strike from the files this replication. Counsel say:

"There is one, and only one, question involved in these mandamus proceedings; that is: Did this court when it promulgated Chancery Rule No. 12, mean what it said? If it meant what it said, then the writ of mandamus should issue."

In his return to the order to show cause appears the following:

"No proof or suggestion was made by or on the part of the relator that it would be more difficult or inconvenient or prejudicial to him for him to produce evidence in support of his said answer if the said replication were now allowed to stand as filed *nunc pro tunc* than it would have been had the replication been filed within 15 days after service of a copy of his said answer, and the said relator by his counsel rested his claim that he was entitled to have said replication struck from the files solely upon the ground that it was not filed or served within said 15 days. And, further, it not appearing that the relator had been in any manner prejudiced by the failure of the complainant to file such replication within 15 days from the time of the service of a copy of the said answer, and it appearing that the said bill is filed by the complainant in his representative capacity, as trustee in bankruptcy appointed by the United States court, for the purpose of obtaining a contribution from the stockholders owning stock not fully paid for in proportion to the amount remaining unpaid from each, respectively, for the purpose of paying the creditors mentioned in the said bill, and that should the

Digitized by Google

said statements of the said answer of the relator be in fact untrue, it would be an injury and injustice to all the other defendants in this cause who might, at the hearing, be found liable, so to contribute as well as to the said complainant as trustee, to allow the said answer to be taken as true by reason of such failure of the said complainant to file a replication; and it also appearing that the said complainant did not admit that the said statements in the answer of the relator are true, but on the contrary claims that the same are untrue in fact, and that in fact the said relator is the owner of a number of shares of such stock on which he has not paid anything, and that the omission to file such replication was inadvertent and unintentional, and that, should such motion be granted and such replication struck from the files, it would be necessary, in order that equity might be done to all parties, to discontinue the present case and file a new bill, which would cause great expense and delay—I deemed it to be for the interest of equity and justice and the exercise of sound discretion to make the order that the said motion be denied, and that the said replication be deemed to have been filed *nunc pro tunc.*"

Counsel for relator rely upon the strict reading of the rule which is as follows:

"The complainant shall file a replication to the defendant's answer within fifteen days after service of such answer. Otherwise the cause shall stand for hearing on such bill and answer unless the time for filing a replication shall be extended."

The practical effect of what was done is to extend the time for filing the replication after the 15 days had expired. We think this was within the discretion of the judge. *Hardwick* v. *Bassett,* 25 Mich. 149; *Daly* v. *Circuit Judge,* 102 Mich. 392 (60 N. W. 758). See, also, *Bender* v. *Circuit Judge,* 181 Mich. 50 (147 N. W. 571); *Van Slyke* v. *Rooks,* 181 Mich. 88 (147 N. W. 579).

The application for the writ is denied, with costs.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

Digitized by Google

DAMS *v.* VINTON CO.

MASTER AND SERVANT—NEGLIGENCE—ASSUMED RISK.

Plaintiff, an experienced employee of a wrecking company, was not entitled to recover for injuries sustained while he was engaged in wrecking a building by reason of the defective or weakened condition of defendant's derrick from which he improperly ordered one of the cranks removed, and, having notice of the defective state of the derrick and of the excessive weight of the girder that the men were lowering, attempted to check its descent with a rope that pulled plaintiff against and into the machine.[1]

Error to Wayne; Collingwood, J., presiding. Submitted October 5, 1915. (Docket No. 5.) Decided December 21, 1915.

Case by Jacob Dams against the Vinton Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Ormond F. Hunt and *Matthew H. Bishop*, for appellant.

Keena, Lightner, Oxtoby & Hanley, for appellee.

MOORE, J. This action is brought to recover damages for personal injuries received by plaintiff while in the employ of the defendant. At the close of the case for the plaintiff, the court directed a verdict in favor of the defendant. The case is brought here by writ of error.

[1] On assumption of risk of injury from defect in simple tool, see note in 51 L. R. A. (N. S.) 337.

As to assumption of risk of defective tool, machine or appliance where the defect is obvious but its importance not appreciated, see note in 13 L. R. A. (N. S.) 691.

Digitized by Google

There are several assignments of error, but the important question is: Did the court err in directing a verdict for defendant?

Plaintiff avers the negligence of the defendant was twofold:

(1) Suitable machinery in good repair should have been furnished him.

(2) Plaintiff, being taken from his usual course of employment and placed in a position of hazard and danger, which were not understood or fully appreciated by him, was entitled to warning and instruction commensurate to the menace.

Each of these propositions was argued orally and in the briefs at great length.

The president and manager of the defendant company, Mr. Vinton, at the time of the trial, was dead. Over objection the plaintiff was allowed to testify about conversations with him and the directions Mr. Vinton gave him. This was clearly incompetent under the statute. The record shows that plaintiff at the time of the accident was 47 years old. He had been for many years in defendant's employ; upwards of 10 years of the time as carpenter's foreman. The defendant had a contract to tear down an eight-story building, the inside of which had been nearly destroyed by fire. In doing this work a derrick was used. It was the claim of the plaintiff that he was unfamiliar with the use of a derrick, and that this one was defective, in that one of the cogs of the wheels on the end of the shaft was partly gone, and the cranks used to turn the shaft did not properly fit on the shaft. Nevertheless, under the direction of the plaintiff, the derrick was taken to the eighth floor and set up, and was used for several days, by him and the men under him, to lower material to the bottom floor, the loads varying in weight, some of them reaching 500 pounds. Plaintiff says the handles or cranks of the derrick were too

Digitized by Google

loose, and they were sent to the shops to be repaired; that when they were returned they were too tight, and an attempt was made to remedy this trouble by filing; but that the workman who was doing this was sent to some other work before it was finished. The roof of the building was sustained by steel trusses. The plaintiff's claim is that, when he got through with the work a carpenter should do, he told Mr. Vinton he should send a man who understood steel work, and that Mr. Vinton told him to go on with the work, and that he unwillingly did so. One end of the rope on the derrick used to lower the article was wound around one of the shafts in such a way as to act as a snub rope.

We quote from the testimony of the plaintiff:

"It was in the small wheel where the wheel was broke out, with one-half a tooth out. After the elevators was taken down, Mr. Vinton directed me to cut the trusses up. I was told to cut this girder in two pieces, and I said we could not do that. I said in two pieces it was too heavy. The trusses was about six ton, and I told Mr. Vinton I thought it should be cut into four or five pieces, and he said in return: 'That is too much work. It takes too much to cut that iron up, too much expense.' And told me to cut it into two pieces, and then he said, 'If you can't do them in two pieces, you must take it in three pieces. It costs too much in expense.' And I cut them in three pieces. The pieces were about 20 feet long and about 6 feet high, and was composed of angle iron. * * * When the girders or trusses was cut in three pieces, each piece would weigh about two tons. * * *

"We take and put on top of the pulley, and hang it on here, and that other end we hang on this iron, and start to turn her, and here we hoist it so that we get it down on the floor, right on the sides of the derrick, and after we get him on the side, and we loosen it up, and sling over the derrick on one edge, and then we raised it so that we get it down plumb so that it hung up endwise by the derrick. We took that truss from the bottom so that over the machine, where we turned the winch, over the drum, I got the truss high

Digitized by Google

enough so we pushed it out and started to lower it down, and got the truss so far that he could not turn more with this crank, so he stopped. The truss was right against the handle where he turned; he could not turn where the truss hangs for his handle. It happened this way, that the truss swings more on the left side than the right side, so the right side, the crank was free, and the left side was against the truss, so that he could not turn, we could not lower, the truss hangs right in place. Then I told the two men to stop the machine. I told them they had to look out now, we would be in danger above this crank, and I say: 'Lutsky, take your handle off.' Lutsky was on the west side—the left side. I face the derrick. I told Lutsky, 'Take your handle off now, so long as we get the truss down that you get back again your handles.' And King holds tight, and I said, 'Hang on,' and 'I hang on to the rope and you hang on.' I hold the snub rope. I help him to hold it this way, and he helps a little too. It was like a brake. That derrick hasn't a brake, and used the rope in place of the brake.

"After Lutsky had taken his handle off, I told King, 'Now we start, just to easy slow down,' so he started to turn. Of course, it was a little hard, and I pulled on my rope too. I held my rope so much as I could, but it was two tons heavy, and we got about four feet down, which takes six or seven minutes. It was pretty slow, and at once the handle slips off. King's on the right side, and, so quick as the handle slips off, it went down. That rope gives me a push, and pulled me to the machine, and I got this arm between the two cog-wheels, and at the same time the drum of the machine break all in pieces, and went up in the air, and the thing comes down and break the leg."

The plaintiff received very severe injuries.

It is apparent from the record that we have the case of a man of mature years, of sufficient experience and intelligence to be made a foreman of woodworkers, who is set to work using a machine of simple construction to lower articles of various weights with a machine the condition of which he had knowledge. And he also had knowledge of the weight of the articles to be low-

Digitized by Google

ered. He was giving the orders, and, knowing the above facts, and also claiming to know that the cranks to the derrick were not properly fitted, he deliberately directs that one of the cranks be removed.

The occurrence is a very regrettable one, but, unless we are to establish a new rule of law, we must affirm the judgment. See *Coleman* v. *Cartage Co.*, 174 Mich. 231 (140 N. W. 539), and the cases cited therein.

The judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

DODGE *v.* NORTH END IMPROVEMENT ASSOCIATION.

1. INJUNCTION — EQUITY — PARKS — CONVEYANCES—INAPPROPRIATE USE—DEDICATION—REMEDIES.

   Equity will interfere, at the instance of an adjacent proprietor, to restrain a city from making unlawful use of property dedicated by the original owner as a park, with the express limitation that no other use should be made of it, provided that the municipality makes use thereof in any manner not intended, and inappropriate for a public park.

2. MUNICIPAL CORPORATIONS—PARK—PAVILION.

   A pavilion erected in a park to serve the purpose of a waiting room for cars and of shelter for those who made use of the park, and as a refreshment stand, and properly situated therefor, did not invade the limitations of the dedication whereby it was expressly stipulated that the

Digitized by Google

property should be used for a public park and for no other purpose.[1]

3. SAME—DEFINITION.

A public park may be defined as an open or inclosed tract of ground adapted to and set apart for pleasure, recreation, ornament, light and air of the inhabitants of the town in or near which it is located.

Appeal from St. Clair; Law, J. Submitted October 7, 1915. (Docket No. 20.) Decided December 21, 1915.

Bill by Charles K. Dodge against the North End Improvement Association and others for an injunction. From a decree for defendants, complainant appeals. Affirmed.

Stevens, Graham & Stevens, for complainant.

Carl A. Wagner and *Burt D. Cady*, for defendants.

MOORE, J. In April, 1912, the late Senator Thomas W. Palmer and his wife deeded to the city of Port Huron about 10 acres of land. The deed contained the following language:

"It is provided that the intent and purpose of this indenture is to convey to the city of Port Huron the above-described land and premises to be used only as a public park and for such use only the land above-described is conveyed in perpetuity; which said land is to be improved and properly cared for by the grantee herein, and is hereby dedicated to the use of the public forever. And provided further that nothing in this conveyance contained shall be so construed as to defeat reversion to the grantor or his heirs in case said property should ever be used for any other purpose than that above designated."

The testimony is that the defendant, the North End Improvement Association, is incorporated.

[1] As to what use of parks amounts to diversion from the use for which they were dedicated, see notes in 25 L. R. A. (N. S.) 980, 50 L. R. A. (N. S.) 465.

Digitized by Google

"It was organized for the purpose of improving the north end of the city in any way they could. to put it in a more sanitary condition, and trying to induce the people to keep their premises in a sanitary condition, and to beautify the same."

On July 23, 1912, a communication in writing from the North End Improvement Association to the city commission requested permission to build a pavilion on Palmer Park close to the corner of Garfield street and Gratiot avenue. On August 14, 1912, permission in writing was issued by the city commission to the North End Improvement Association to erect this building on the northeast corner of Gratiot avenue and Garfield street, the building to be 16 feet wide, 30 feet long, and 8 feet in height, and was to conform in construction to a type open-pavilion-class building. The building was started in August, 1912, and was completed in October, 1912.

The complainant owns a house and grounds valued at $5,000 across the street from Palmer Park. He claimed his premises were decreased in value by the erection of the pavilion, that it shut off his view of the river, that it and its surroundings constituted a nuisance, and that it was used simply as a railroad waiting station and was not an adjunct of the park, and filed this bill praying, among other things:

"That the building erected on said park property may be required to be removed. * * * That said premises may be decreed to be used for park purposes only. * * * That your orator may be awarded such damages as it may be shown he has wrongfully sustained. That your orator may have such other and further relief in the premises as equity may require and to your honor may seem meet."

The city filed an answer in which appears the following:

Digitized by Google

"Says, however, that it understands that the inhabitants of the city located in the vicinity of the said park are greatly interested therein, and proposed to this defendant that for the purpose of promoting the public convenience, safety, and pleasure, and to facilitate the use by the public of the said park, that they would construct thereon with the permission of the city a public waiting room wherein persons resorting to the park might find shelter in the event of rain, inclement weather, or excessive sunshine. That for this purpose this defendant permitted the erection on the southeast corner of said park, adjoining the street railway, of a small structure designed as a waiting room and public shelter. * * * And submits that under the terms of the gift the officials of the city are made the sole judges as to the character and extent of the changes to be made in the said park and as to what modification thereof is best needed to secure the comfort, convenience, and public enjoyment of the aforesaid park. * * *

"This defendant avers that the building so erected is suitable and sufficient for the purposes for which it is constructed; that its location will best serve the convenience of the public."

The improvement association also filed an answer. After a full hearing before a circuit judge who lives at Port Huron, he dismissed the bill of complaint. The case is brought here by appeal.

The trial judge filed an elaborate written opinion, from which we quote:

"During the summer of 1912, the North End Improvement Association promoted a scheme to place a building on the southeast corner of said out-lot 16 for reasons which will presently appear. Gratiot avenue is a part of the main thoroughfare through the city of Port Huron in a northerly and southerly direction. In this street and its extensions is a street railway track upon which are operated electric cars. Garfield street is about two miles north of the center of the business part of the city of Port Huron and about two miles south of the northerly city limits. In the northerly part of the city are located two cemeteries, a large

Digitized by Google

public park, a private park and resort, and several beaches which are used by many people, both by inhabitants of the city and by strangers, as summer resorts. During some portions of the year only part of the cars of the street railway are operated north of Garfield street; hence, people going from the city to points north of Garfield street frequently have occasion to wait at this street for cars which will carry them to the cemeteries, parks, or resorts in the northerly part of the city. The main object which the North End Improvement Association had in placing the building heretofore mentioned on the southwest corner of lot 16 was to provide a shelter for people who had occasion to wait for cars at Garfield street.

"In the summer of 1912 this association, by voluntary labor and contributions, cleared the ground of shrubs and rubbish, took down an old unsightly post and wire fence, and constructed a one-story building in its dimensions 10 feet north and south and 30 feet east and west, on the southwest corner of lot 16 directly across Gratiot avenue from complainant's residence. A partition was run through this building so that the west end of the building nearest Gratiot avenue is an open pavilion 12 feet by 16 feet in size and in the east end an inclosed room about 18 feet by 16 feet in size. This building was constructed of good materials and neatly painted. It was completed as it now stands when this suit was commenced on June 25, 1913. It was lighted by electric lights. This building was planned and constructed with the full knowledge and approval of the city commission of the defendant city, without cost to the city. The object which inspired the North End Improvement Association to construct this building was to furnish a shelter for people who had occasion to wait at Garfield street for the north-bound street cars to the cemeteries, parks, and resorts located in the northerly part of the city. In order that the building might be looked after properly, the North End Improvement Association placed the defendant Mary I. Thayer in charge of the building and gave her permission to sell light refreshments therein such as are usually sold in public parks, as compensation to her for looking after the building. At the time this bill of complaint was filed, Mrs.

Digitized by Google

Thayer was in charge of the building selling light refreshments therein.

"It is now contended by both defendants that the building is not only useful as a waiting room for street car passengers, but also for such uses in connection with out-lot 16, called Palmer Park, as a pavilion in a public park is usually serviceable, to furnish a shelter for such pleasure and recreation seekers as come to the park, to furnish refreshment, and to provide a shelter to be used in connection with the ice skating rink which it is contemplated to establish during the cold months.

"Both defendants now claim that the construction of this building is but a preliminary step in the improvement of this park so as to make it available and useful for recreation seekers.

"The North End Improvement Association has also made, under the control of the city officials and with their approval, several improvements to out-lot 16 towards making this lot available and serviceable for park purposes, and I find that all that has been done in this way, including the construction of the building, has been done by the North End Improvement Association at the private expense of the members, and with the approval of the city officials, in the utmost of good faith, and with the object in view of the improving of Palmer Park and the benefiting of the north part of the city of Port Huron, and that these efforts have resulted in improving that park and thus directly benefiting the north part of the city of Port Huron, and indirectly the whole of the city."

The position of complainant is tersely stated by his counsel in the brief as follows:

"The first proposition complainant makes is that this land dedicated to the people of the city of Port Huron as a public park has been subverted to a use foreign to that of a public park for which it was granted to the city.

"We maintain that, when property is dedicated for a public park, abutting property owners have a right to enjoin its use for any other purpose than a park, and that the erection of this building to be used as a transfer station for the patrons of the city electric railway is not using the property as a park.

Digitized by Google

"The city of Port Huron is merely the trustee of the park, which belongs to the public forever, and as such trustee it is the duty of the city of Port Huron by its officers and agents to cultivate, adorn, and decorate such park for park purposes only, and that to do anything else would be a violation of the trust.

"We maintain that the building erected as the proofs show has nothing whatever to do with the park as a park; that it was not put there for the purpose of adorning and decorating the park or as an improvement to it, but was put there for the intent and purpose of a waiting room, not for people who wish to visit the park, but for those who, having taken the wrong car to go through to their destination, are obliged to wait on the corner for one going through to the point they wish to reach."

If the facts warranted the conclusion of counsel that the gift of Senator Palmer has been subverted to a use foreign to that of a public park, there is no doubt that complainant as an abutting property owner might seek the aid of a court of equity. See 21 Am. & Eng. Enc. Law, p. 1072; *City of Chicago* v. *Ward*, 169 Ill. 392 (48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185); *Church* v. *City of Portland*, 18 Ore. 73 (22 Pac. 528, 6 L. R. A. 259).

We think it helpful to quote some of the testimony. One of the witnesses for the complainant who did not approve of the building erected, nor of its location, and who testified it depreciated the vaue of complainant's property, testified, in part, as follows:

"The most desirable part of that park is on the north side in the grove for picnic purposes. The only point from which that grove can be reached is from the corner of Gratiot avenue and Garfield street, except to go around, and in order to reach that high part north of the depression, you have to cross the ravine or depression. I have been over the cinder path and the rustic bridge built by the North End Improvement Association. They offer as short and direct communication with the high ground there perhaps as anywhere.

Digitized by Google

"Palmer Park is a little over 2½ miles from the center of the city, and the citizens desiring to use it for recreation purposes would have to go by street car if they came from the south. That would be the most natural and convenient means of transfer at any time of year. Patrons going to that park by that line of transfer would find it convenient to disembark at the corner and to use the cinder path and rustic bridge to the higher ground on the north side of the park. It is a great convenience to people who visit that park in going to and from it in case of storm and inclement weather to have a building there for their protection or anybody who wants to take the car at that point."

Another witness for complainant testified on cross-examination, in part, as follows:

"*Q.* In your judgment the acquirement of that property as a public park is no benefit to that locality?

"*A.* Not at this time.

"*Q.* Would it be if improved as a park?

"*A.* Yes.

"*Q.* It would not be if left in its natural state?

"*A.* No.

"*Q.* What would you say as to a building for the accommodation of people coming to the park? Would that be a convenience to the public?

"*A.* It would be quite a convenience to the public.

"*Q.* How far is that park located from the center of the city?

"*A.* I should think it is probably two miles.

"*Q.* What would be the means of conveying the general public from the downtown district to the park?

"*A.* By street car.

"*Q.* Is it not a necessary convenience for the traveling public, people going to the park, to have located there a building for their accommodation?

"*A.* If they are going to the park, yes. * * *

"*Q.* From your knowledge of parks and real estate, if the city were building a pavilion for the accommodation of patrons of that park, always taking into consideration that the city was cultivating that for park purposes, would that be a suitable location from that point?

Digitized by Google

"*A.* I think that would be the proper place for it; the cars transfer there, I would think it would. * * *

"*Q.* Would it not be a convenience to the people using the park and coming to it by the street railway to have that building there to receive them?

"*A.* I think it would, yes.

"*Q.* That is true?

"*A.* Yes, sir.

"*Q.* When the park is prepared for a skating rink on that low marshy place, it will be a great convenience to the people coming to that skating rink to have that building there to wait for the cars and to put their wraps there, would it not?

"*A.* It would be a benefit to the public in that way.

"*Q.* The public using the park?

"*A.* Yes. * * * There is a building in Pine Grove Park that has stood there 12 or 15 years. That pavilion has a sort of soft drink place underneath in the summer time. In connection with that building, there are also toilet rooms. From my experience in traveling about the country, I think it is a necessity to have such a building in these parks.

"*Q.* You think because of the fact that people transfer on that corner, and people going to that park would get off on that corner, and that being the most accessible point to the park for people coming on street cars, that is the proper place for such a building, if you are going to have one in the park?

"*A.* I take it, if the city is going to build a building, that would be the proper place."

One of the witnesses for defendants testified, in part:

"The preparation of the ground and the construction of the building has made Palmer Park more desirable for park purposes. It is an improvement to the corner there. It is a starter. We have a starter, and if they continue on they will soon make the park a great place for private picnics. In my estimation, it has made the park more desirable since these improvements have been made, for little picnics and park purposes other than it was before, and the building is used as park pavilion as much as it is for a waiting room."

Another witness testified, in part:

Digitized by Google

"Q. That park there has not been so developed as to make it a place for people to go and congregate for park purposes?

"A. I have seen a number of people there at once.

"Q. In what part of the 10 acres were they?

"A. In the low portion of the park.

"Q. You did not see any of them having occasion to use this building?

"A. They used the building because they were skating, a hundred or more at a time, and I have seen them going from the pavilion down there and skating in the winter time.

"Q. They were using McNeil creek to skate on as you passed four times a day?

"A. Yes, sir."

A member of the improvement association testified, in part:

"I am a member of the North End Improvement Association, and am familiar with the purposes of that association. It is composed of citizens in the north end and some from other parts of the city. The purposes and objects are set forth in our articles of association.

"Q. What can you say to the court as to what the policy of the association is as to this pavilion and waiting room, and whether or not the work is to stop there, or whether it is the purpose of the association to carry the work further?

"A. The work as projected was partially for the waiting room and partially for a pavilion for the park. It was partially outlined to make improvements on the park, as funds of the association could be gotten together by voluntary work of the members and sympathizers in this work.

"Q. Now, has the end of the project been reached by the construction of this building?

"A. By no means.

"Q. Tell the court what that purpose is?

"A. * * * First, the building has not been completed as outlined. Further, the matter was talked over of connecting the two parts of the park by a rustic bridge and cleaning up and making the park presentable, so it would be more like a park for park

Digitized by Google

purposes. Of course, it cannot be done all at once with voluntary subscriptions. The matter of rest rooms and toilet rooms has been talked over several times, and, as to toilet rooms, that matter was discussed at one of our last meetings, and generally agreed upon that, it being an open building, it would be impractical to put in toilets with the water flushed, but it was talked of putting in a dry closet, which can be made very sanitary and put in very cheaply. It is the intention to continue this work of which the building of this pavilion is but the beginning and the installation of toilet rooms and rest rooms for the accommodation of the people who are obliged to assemble there at this point, and for whose benefit this waiting room was constructed."

There was testimony as follows:

"The object of the association is to improve the conditions in the north end of the city wherever we have an opportunity. I think it was at least partly due to our influence that Elmwood street bridge was placed back in place, and the road fixed in condition and the bridge over. We built the pavilion in Palmer Park, cleared the ground, built a rustic bridge, and cinder path. The purpose of having that building on the corner of the park was as a pavilion for the park and the other as a waiting room."

On examination by Mr. Wellman, witness stated:

"I have visited parks in other cities. In any parks that I have ever seen, there has been a waiting room of some sort to accommodate the people, for people coming and going. That is a recognized park purpose. * * * The majority of the land in that park is low. There is not much difference between the quantities of high land on the south side and that on the north side of the ravine. In connection with the use of the pavilion during the winter months, we have made arrangements to block McNeil creek up and flood that low ground and make a skating rink for the people, and to take the question up of opening up that pavilion and put in a heating system so that people may go in there and hang up their clothing and put on their skates, etc. That is part of the program

Digitized by Google

planned by the association for this winter. I think Mr. Draper has the written resolution to that effect.

"The resolution was received in evidence."

In Words and Phrases there are several definitions of the words "park" and "public park." One of them reads:

"A park is variously defined to be a pleasure ground in or near a city, set apart for the recreation of the public; a piece of ground inclosed for the purposes of pleasure, exercise, amusement or ornament; a place for the resort of the public for recreation, air and light; a place open for every one. *State, ex rel. Attorney General,* v. *Schweickardt,* 109 Mo. 496, 19 S. W. 47, 51 (citing *Perrin* v. *New York Cent. R. Co.,* 36 N. Y. 120; *Price* v. *Inhabitants of City of Plainfield,* 40 N. J. Law [11 Vroom] 613)."

Another definition is:

"In its common and ordinary significance, a public park is an open or inclosed tract of land and adapted for, set apart, maintained at public expense, and devoted to the purposes of pleasure, recreation, ornament, light and air for the inhabitants of the town near or in which it is located." 3 McQuillin, Mun. Corp., pp. 2533, 2534, and cases cited in footnote.

In 28 Cyc. p. 936, it is said:

"Property constituting parks, public squares and commons may, in the absence of express restriction, be used in such manner as will promote the public interest and is not inconsistent with the purpose for which it was intended."

Again:

"A park may be devoted to any use which tends to promote popular enjoyment and recreation, although primarily involving the ideas of open air and space, occupation in part by monuments, statues, museums, galleries of art, free public libraries and other agencies contributing to the aesthetic enjoyment of the people, is not a perversion of the lands from park purposes. These are maintained for the use, convenience and

Digitized by Google

recreation of persons resorting to and using public parks." 3 Dillon, Mun. Corp. pp. 1749, 1750.

"Some of the powers of control and regulations for their use held to be reasonable and valid are: * * * Power to lay out pleasure drives around the borders of a public square, authority to erect a building in a park for public purposes, and if a building called a casino so erected is adapted to a public use, the court will not assume that is to be used for private purposes; to erect a dwelling house on park property to be used by the park superintendent and his family as a residence and also for an office by such superintendent and his associates." 3 McQuillin, on Corp. p. 2541.

We think it clear that the use made of the building is a public use, and that such use is not foreign to that of a public park.

The decree is affirmed, with costs.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

SPROAT *v.* HALL.

1. LIMITATION OF ACTIONS—NONRESIDENCE—ABSENCE FROM STATE.
Plaintiff brought assumpsit on an obligation dated more than ten years previous, and which defendants claimed was barred by the statute of limitations. They were actors whose location frequently changed and who were out of the State, traveling about the country during most of the ten-year period. It was, however, defendants' claim that they maintained their domicile in Detroit, Michigan, during the whole time and that they often returned to their said place of residence, and had no other domicile. Under 3 Comp. Laws, § 9728 (5 How. Stat. [2d Ed.] § 14135),

Digitized by Google

held, that neither absence from nor residence outside the State would suspend the running of the statute, but that both conditions must concur, and the question of defendants' domicile should have been submitted to the jury, upon proofs having a tendency to sustain the claim of either party.

2. SAME—HOME—TRAVELING.

The profession of an actor who travels from State to State does not preclude him from having a home at a particular place.

3. SAME—TRIAL—REFUSING REQUESTS.

Where the trial court refused to charge as requested that the effect of defendants' alleged residence in Michigan during most of the time during which plaintiff claimed he was outside the State would bar the suit, and where the court stated his opinion to be that defendant must have been within the State a consecutive period of six years, after the demand accrued, and the question might perhaps be one of fact, counsel for the defense concurring but saying that the question of residence in Michigan was as he understood it eliminated by the court, he could not be held to have deterred the trial judge from submitting to the jury the issue as to his residence in the State, and, particularly, in view of requests to charge presented by said attorney bearing upon that issue.

Error to Kent; Brown, J. Submitted October 5, 1915. (Docket No. 1.) Decided December 21, 1915.

Assumpsit in justice's court by William J. Sproat against Lou Hall and wife, for an indebtedness evidenced by a writing. Judgment for plaintiff; defendants appealing to the circuit court. Judgment for plaintiff. Defendant Lou Hall brings error. Reversed.

Rodgers & Rodgers, for appellant.

Hall, Gillard & Temple, for appellee.

A verdict for plaintiff was directed by the court, and judgment was entered on the verdict; plaintiff having submitted to nonsuit as to defendant Hilda

Digitized by Google

Thomas. The suit was begun January 24, 1914, upon a cause of action which, as appears by the pleadings and proofs, accrued to plaintiff January 28, 1903. Defendants gave notice of their reliance upon the statute of limitations. There was written evidence of the debt relied upon by plaintiff, in the form of an I. O. U., which bore the date last above, and which was executed in Chicago, Ill., by defendant Hall. Plaintiff was and is a resident of Grand Rapids, Mich. Defendants, when the demand accrued, were nonresidents of Michigan, and, as has been stated, were absent from the State. They are husband and wife, by profession actors, and during all of the period in question, with rests and vacations, traveled about the country. From the year 1903 until 1910, except perhaps one or two years, they were in Michigan, and in Grand Rapids each year, playing engagements there, to the knowledge of plaintiff, who at some of the times met them, and who could during any of those years have there obtained personal service of process upon them. Defendant Hall offered testimony tending to prove that in the winter of 1904, or the spring of 1905, he established a residence in the city of Detroit, Mich., which for more than nine years he maintained, and had no other residence; that, when occasion permitted, he and his wife returned to and lived in Detroit, where his clothing and such household goods as they possessed were stored and, when they were there, were used. That the debt accrued at the time hereinbefore stated, that no part of it had been paid, that at that time defendants were absent from and resided out of the State, and that defendant had not been within the State, either a period of six years or different periods amounting to six years, since January 28, 1903, were admitted facts.

The trial court instructed the jury, in part, as follows:

Digitized by Google

"In view of the fact that there is no dispute here but what there was a liability on the part of Lou Hall to Mr. Sproat January 28, 1903, and that no part of it has been paid, that liability was $150.88, and in view of the fact that the testimony establishes the fact and it is not disputed, that the debt was incurred outside of the State of Michigan, by a nonresident of the State of Michigan, and in view of the fact that the defendant since that time, under the law as I see it and apply it, has not come within the State of Michigan and been here a sufficient length of time to establish his defense, that of the statute of limitations, it simply remains for the court to say to you that the plaintiff has made out his entire case against the defendant Lou Hall."

In a carefully prepared brief counsel for appellant states his proposition, refused by the trial court, in this way:

"If the debtor is outside of the State of Michigan when the cause of action shall accrue, the statute of limitations does not commence to run until the debtor shall come within the State of Michigan. The statute of limitations does commence to run as soon as the debtor shall come within the State of Michigan under such circumstances that the creditor by the use of ordinary or reasonable diligence may have an opportunity to sue him. The statute will run from that time on, except during such periods as the debtor shall be both absent from and a nonresident of the State of Michigan. A careful examination of a multitude of authorities on this subject in the various States justifies us in saying that there is throughout the American jurisprudence scarcely a dissenting voice to be heard in opposition to the above conclusion."

Counsel for appellee say:

"Other States have the provision like ours that the statute does not run while the defendant is absent from and resides out of the State. In such States it is held that absence and nonresidence must concur. Our court held that to be the correct rule in *Campbell* v. *White*, 22 Mich. 178. We admit that to be the correct

Digitized by Google

doctrine. In the case at bar it was conceded that between January 28, 1903, and January 24, 1914, the defendant had been absent from the State all of the time, with the exception of about two years. Therefore the claim is not barred, unless defendant actually resided at Detroit from 1904 or 1905. That is why we say that the one and only question in this case is: Where did Lou Hall reside after 1904 or 1905?"

They further say that the court can say, as matter of law, that defendant was not a resident of Michigan within the meaning of our statute of limitations.

The statute (3 Comp. Laws, § 9728; 5 How. Stat. [2d Ed.] § 14135) provides that actions such as this one is shall be commenced within six years next after the cause of action shall accrue and not afterwards. It is, however, further provided (3 Comp. Laws, § 9736; 5 How. Stat. [2d Ed.] § 14143):

"If at the time when any cause of action mentioned in this chapter, shall accrue against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into this State, and if after any cause of action shall have accrued, the person against whom it shall have accrued shall be absent from and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action."

OSTRANDER, J. (*after stating the facts*). While our statute was copied from Massachusetts, in which State its form, as copied, had been reached by successive modifications, still the whole chapter, in its present form, is "to be read as one act, with its several parts and clauses mutually acting on each other as their sense requires." *Conrad* v. *Nall*, 24 Mich. 275, 277, 278. Its construction and its application to cases like the one before us was settled many years ago. *Campbell* v. *White*, 22 Mich. 178; *Conrad* v. *Nall*, *supra*; *White* v. *Campbell*, 25 Mich. 463. In the first of these cases it was distinctly held that it was the leg-

Digitized by Google

islative intent that the operation of the exception should be concurrent with the existence of the obstacle which prevents service upon the debtor, and that neither absence from the State nor residence out of it will, of itself, suspend the running of the statute, but both must exist to take the case out of the statute. In *Conrad* v. *Nall*, which was an action on a judgment, the court charged the jury as follows:

"*First.* That, if they should find that the defendant had not resided in the State ten full years subsequent to the rendition of the judgment, the action was not barred, and the plaintiffs were entitled to recover.

"*Second.* That, if they found that the defendant became a resident of Ohio before the expiration of ten years from the recovery of the judgment, the statute did not begin to run again in his favor until his return to the State to reside.

"*Third.* That, to avail himself of the statute, the defendant was required to prove that, deducting all the times of his absences from, and residence out of, the State, he was within the State ten years after the recovery of the judgment and before the commencement of this suit.

"*Fourth.* That, to avail himself of his temporary returns, he was required to show that his return was actually known to the plaintiffs, or so open and notorious as connected with some locality that the plaintiffs, by using ordinary diligence, could have known of them."

This charge was apparently approved, and the judgment for plaintiff was affirmed.

The rule of the cases cited has not been questioned —certainly has not been changed—by any decision to which our attention is directed. Applied to the facts, it is at once evident that the period of defendant's residence in the State, if he resided here at all, is of controlling importance. We cannot say, as matter of law, that the profession of an actor, who usually, during the theatrical season, travels from State to State, pre-

Digitized by Google

cludes his having a home at a particular place, the fact of which may be so notorious as to be discoverable by a creditor residing in the same State. The phrase "and reside out of the State," in our statute, was interpreted in *Campbell* v. *White* to import,

"something so distinct, definite, and fixed as to constitute the party's home the place of permanent abode, which, whenever left temporarily or on business, the party intends to return to, and on returning to, is at home."

There is no reason for giving the term "reside in the State" a different meaning. There was testimony from which a jury might have found that defendant had such a home in Detroit from the spring of 1905 until suit was begun. There was testimony sustaining plaintiff's theory of a continued nonresidence of defendant.

It is said by counsel for appellee that the court expressed an intention of submitting the question to the jury, and was deterred from so doing by counsel for defendant. The court made a statement of what he understood the testimony to show, and, to some extent, his views of the controlling rules of law. In doing so he eliminated defendant's theory of the effect of defendant's residence in the State from and after 1905. Later, in a colloquy, the court having expressed the opinion that defendant was bound to make it appear that he had been in the State a consecutive period of six years, or a number of times aggregating six years, before suit was begun, and after the demand accrued, and that this might be a question for the jury, counsel for defendant said that the testimony undoubtedly failed to establish either fact. But he also said in that connection:

"Now, talking about residence in Michigan, that is another proposition, but I understand that is eliminated."

I think it sufficiently appears that counsel for de-

Digitized by Google

fendant did not deter the court from submitting the question of defendant's residence in the State to the jury. His remarks were made with reference to rulings which treated the question of residence as of no importance, rulings which rejected his defense, even if the fact of defendant's residence in Detroit, as claimed by him, was established. This view of the position of counsel is further sustained by the form of his requests to charge which were refused. I think, therefore, he is entitled to urge in this court that the rejection of his theory by the court below was error, and that his theory called for a submission of the question of defendant's residence to the jury.

The judgment is reversed, and a new trial ordered.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

PALMER v. LOCOMOTIVE ENGINEERS' AND CONDUCTORS' MUTUAL PROTECTIVE ASSOCIATION.

INSURANCE—INDEMNITY POLICY—LOSS OF EMPLOYMENT—BREACH OF CONDITIONS.

Under a mutual benefit certificate providing for insurance against loss of employment in cases other than discharge for absence from engine, use of liquors and similar reasons, and referring to the application which contained the clause, "that the cause assigned by my employer for suspension or discharge shall be the sole basis of determining the liability of the association," plaintiff was not entitled to recover on his own showing that the employer discharged him for being absent from his engine and visiting

Digitized by Google

saloons, and he was properly prevented at the trial from attempting to prove that the assigned cause was untrue; that he had been absent with leave and visited certain saloons on a mission of his superintendent.

Error to Ottawa; Cross, J. Submitted October 8, 1915. (Docket No. 30.) Decided December 21, 1915.

Assumpsit by Edward R. Palmer against the Locomotive Engineers' and Conductors' Mutual Protective Association on a benefit certificate. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Lillie & Lillie, for appellant.

Arthur P. Hicks, for appellee.

OSTRANDER, J. The certificate or policy sued upon contains the following:

"This certificate does not include nor cover any suspension or discharge not in the nature of a penalty or measure of discipline, nor any case arising from or traceable to any of the following causes or conditions, viz.: Absence from engine while in charge of same; nor for any act or acts while not in charge of your engine; use of intoxicating liquors; soliciting his own discharge or suspension; striking; garnishment; fighting; assaulting superior officers; knowingly disobeying orders or rules of traffic conditions; disregarding national or State laws; being pensioned; personal injury; physical disability or old age."

The certificate purports to have been issued in consideration of the warranties and representations made by the plaintiff in his application for membership, and a copy thereof was attached. In the application the plaintiff agreed:

"That the cause assigned by my employer for suspension or discharge shall be the sole basis of determining the liability of the association."

Digitized by Google

The cause assigned for plaintiff's discharge was—

"for frequenting saloons, also leaving his engine 2381 at Grand Haven on the night of August 23d for two hours without permission from his foreman."

In his notice of claim plaintiff specified:

"I was discharged for leaving my engine and visiting saloons."

Notice of the indicated defense was given by defendant with its plea. Plaintiff sought, by recital in his notice of claim and by testimony upon the trial, to show that he left his engine by permission and visited saloons while off duty to get a certain man for investigation which was private with the superintendent; in other words, sought to show that the cause assigned by the employer for his discharge did not exist. The testimony was excluded, a verdict for defendant directed, and a motion for a new trial was overruled. Upon the authority of *Stitt* v. *Protective Ass'n*, 177 Mich. 207 (142 N. W. 1110), it is held the rulings were right.

Judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

GERMAIN *v.* LOUD.

1. SALES—LUMBER—CONTRACTS—DESTRUCTION.

Where plaintiff's decedent agreed to buy certain lumber from the defendant, and nothing was expressed in the correspondence as to the time when title should pass, but an inspection, to be paid for by both parties was required, and part of the lumber was delivered upon inspection, as agreed; the contract providing that decedent should take all the lumber of a quality described or named, and where the parties recognized in subsequent dealings that the lumber had all been sold and several letters passed in which they assumed that plaintiff was the buyer, and plaintiff advanced a considerable part of the purchase price, and where it appeared that the lumber had been piled separately, the vendee was not, as matter of law, entitled to recover advances made before it was burned, but the issue was one to be determined from all the acts of the parties and their dealings subsequent to the claimed sale.

2. SAME—EVIDENCE.

In the absence of a specific arrangement concerning the title to the property, in a contract of sale, the question whether title has passed is usually an issue of fact, to be determined from the acts done and promises made and from all the attendant circumstances.

3. SAME—QUESTION OF FACT—DIRECTED VERDICT—TRIAL—CONDUCT OF COUNSEL.

Both attorneys requesting the court to decide the issue as one of law, the trial judge did not err in determining the issue and in not submitting the point to the jury, although different inferences were admissible from the testimony.

Error to Saginaw; Gage, J. Submitted October 6, 1915. (Docket No. 17.) Decided December 21, 1915.

Assumpsit by Louise A. Germain, as executrix of the estate of Edward Germain, deceased, and another,

Digitized by Google

against Henry N. Loud and others, copartners, doing business as Henry N. Loud & Sons, for money had and received, etc. Judgment for defendants on a directed verdict. Plaintiffs bring error. Affirmed.

Weadock & Weadock, for appellants.

Henry, Henry & Henry, for appellees.

OSTRANDER, J. There was a contract between defendants, as vendors, and plaintiffs' decedent, as vendee, for the purchase and sale of certain lumber. The vendee made an advancement upon the purchase price. The lumber burned. The vendee sued to recover his advancement. The vendors claimed that the title to the lumber had passed to the vendee, and asked for a judgment for the balance of the purchase price. Upon the trial of the cause, both parties having rested, counsel for plaintiffs and counsel for defendants each moved for a peremptory instruction. The court thereupon said:

"I understand the position of the parties on both sides. The plaintiff in this case claims his position is that under the facts in this case it is purely a question of law for the judge, and it is the duty of the judge to direct a verdict for the plaintiff; and the defendant, on the other hand, contends that it is purely a question of law, and that it is the duty of the judge to direct a verdict for the defense on the conterclaim. If that is not your position, I want you to state it."

Counsel for both parties said that their position was as stated by the court. The court expressed the opinion that the question of the intent of the parties was involved, and was a proper question for a jury. At considerable length—the jury being absent—he went over portions of the testimony and referred to authority, concluding by saying:

"That is the reason I have suggested to you before that I thought that really this was a case for the jury,

Digitized by Google

and not the court. But, as you have put it up to the court, I am disposed to decide it."

The jury having returned into court, he instructed them to return a verdict for defendants, and in doing so said, among other things:

"After examining all the correspondence in this case, and the memorandum of agreement made and offered in evidence here, and all the testimony in the case, I am of the opinion that it was the intent of both parties that all the 4—4 lumber, Norway, and all the 5—4 Norway at Loud's mill was sold to Germain, and the consequence is that at that time it was the duty of the Louds, under the memorandum of agreement, to load that lumber on the cars, but it was for Germain to pay the freight and to pay for the lumber."

Much else was said by the court which makes it plain that he regarded the question to be decided as one of the intention of the parties, to be ascertained from all of the testimony. In this court the plaintiffs, appellants, affirm that:

"There is no evidence in the record that it was the intention of the parties that the title to the lumber in question would pass to the plaintiff Germain, until it had been inspected, the kind, quality, quantity, and price ascertained, and the lumber actually delivered f. o. b. cars Au Sable."

And in the reply brief say:

"We contended in the court below, and contend here, that upon the evidence the court should have directed a verdict for plaintiff; but if we were wrong in this position, and the court was satisfied that there was an issue of fact in the case which should be submitted to the jury, we insist it was his duty to submit such question to the jury, notwithstanding the attorneys for the respective parties did make the claim for their respective clients that the verdict should be directed in their favor. Notwithstanding the claims of counsel, the court still has a duty to perform according to its best judgment, and if the court was satisfied that the case should be submitted to the jury, it cannot justify

Digitized by Google

directing a verdict for the defendants, because the plaintiff, too, had asked a verdict directed for it. We now claim that if, on all the evidence in the case, this court should find there was a question of fact which should have been submitted to the jury, the judgment should be reversed."

The errors relied upon are based upon the charge and the direction of a verdict for defendants.

Unless the parties to a contract for the sale of personal property, not paid for and not delivered, have specifically agreed that the title thereto shall or shall not pass, the question whether title has passed to the buyer is one of intention, to be gathered from all the circumstances attending the bargain. It is a question of fact, to be answered by construction of whatever agreement was made. In construing the agreement of the parties, the courts indulge various presumptions, none of them conclusive, and it sometimes occurs, the terms of the contract and the acts of the parties with reference thereto and to the subject-matter being undisputed, that the courts are able to and do determine the question. Instances are: *Whitcomb* v. *Whitney*, 24 Mich. 486; *Carver* v. *Sherman*, 172 Mich. 264 (137 N. W. 519); *Tyler Lumber Co.* v. *Charlton*, 128 Mich. 299 (37 N. W. 268, 55 L. R. A. 301, 92 Am. St. Rep. 452). There is no occasion to attempt to restate or to amend the statements of the controlling rules found in *Lingham* v. *Eggleston*, 27 Mich. 324, and in *Byles* v. *Colier*, 54 Mich. 1 (19 N. W. 565).

In the case at bar, there was no specific agreement about the title to the lumber. The intention of the parties, a fact, is to be found in the terms of the bargain they made, the circumstances attending its making, and the acts of the parties. There is no occasion to set out in detail the history of the transaction. It covers a period of more than two years. Early in the year 1909 a contract was made for the purchase and sale of all of certain lumber, dry and in piles. Telephone

Digitized by Google

conversations regarding the arrangement occurred, but because of the death of Mr. Germain before trial what was said is not before us. For various reasons the lumber was not all of it shipped, and some of it was sold to other parties by the vendors, with the approval and presumably by the direction of the vendee. But, repeatedly, both parties to the agreement recognized the fact that the lumber, the quantity having been estimated, was sold to Mr. Germain. In 1911, under date of February 6th, a writing was made, signed by both parties, reading as follows:

"To H. M. Loud Sons' Company:

"Agreeable to conversation we had with Mr. E. F. Loud, we learned that there is still about 80,000 feet or less of 4—4 Norway and tamarack, about 167,000 5—4 Norway, with a small percentage of tamarack, at the mill left unshipped on purchase made some time ago, which was purchased at the price $14 for the common and better Norway, $10 for the culls, Norway, and $12 common and better tamarack, and $8 for the culls—above prices f. o. b. Au Sable, Michigan. We agree to pay $2,000 on or before May 1, 1911, and balance to be paid on or before June 1, 1911, and, if lumber is not all shipped, settlement to be made based on average value of lumber, based on the above prices, and final adjustment to be made when lumber is all shipped. It is also understood that we will use our very best efforts to ship this lumber at an early period. In the event of lumber being moved, payment to be made on 10th of month following, net."

An inspector was agreed upon, and he inspected whatever lumber was shipped after this agreement was made; each party paying one-half the inspection fees. Evidence of the intention of the parties is to be found in the agreement above set out, and in the fact that it was made after the vendor had insisted upon some completion of the original agreement. Under date of January 13, 1910, the vendors (defendants) had written to the vendee (plaintiffs' decedent) as follows:

Digitized by Google

"Last March we entered your order for all the 4—4 and 5—4 Norway which we had in stock at that time. This order included the 4—4 and 5—4 tamarack that was filled in with the Norway. On this order we shipped 107,345 feet of 4—4 and 99,774 feet of 5—4. There still remains unshipped, as near as we can estimate, 216,000 4—4 and 167,000 of 5—4. You stopped us shipping in May last, and, although we have repeatedly asked that you allow us to resume shipment, you have for one reason or another refused to allow us to do so. We have for a long time felt that you were abusing our good nature in this matter, and, while we have tried to have patience, we have arrived at a point where we feel that something must be done. We must either have a check for the lumber, or you must take it in at once. Otherwise we must take some steps to obtain our rights, whatever they may be. Please let us hear from you at once, and oblige."

No objection was made to the recitals contained in this letter, but the answer, dated January 22, 1910, was:

"Replying to yours of the 13th, regarding the 4—4 and 5—4 Norway and tamarack, which you have for us, beg to ask what percentage of tamarack there is in this stock, and when the lumber was shipped, and, would you be willing to separate the Norway from the tamarack in loading? We understand from your letter that the 216,000 feet of 4—4 and 176,000 feet of 5—4 covers both the Norway and tamarack."

There was further correspondence. The vendors again insisted upon shipping orders, conversations were had, and finally the written memorandum of agreement was made. Under date May 29, 1911, the vendee paid the $2,000. Further evidence of the intention of the parties appears. The original order given by the vendee was for all of the lumber described in a memorandum made by the vendors' agent and submitted to Mr. Germain. The estimated quantity was stated. This lumber was piled separately from other lumber—was identified. Before February 6, 1911, the

Digitized by Google

vendee had received and paid for a considerable quantity of it. He therefore knew its quality. What remained to be done, after February 6, 1911, was to inspect the remainder as it was loaded upon cars, and, if it was not shipped, it was nevertheless to be paid for by the vendee, as per the memorandum of agreement. Prices had been agreed upon; an inspector mutually selected. Nothing was left to further agreement; nothing but to load the lumber as it was called for by the vendee was to be done by the vendors.

I am of opinion, therefore, that there was evidence that it was the intention of the parties that it was understood and agreed that title to the lumber passed to the vendee and that the understanding was mutual before and after February 6, 1911. While, perhaps, different minds might be differently affected by the testimony which is substantially undisputed—different minds might draw different inferences—counsel for both parties requested the court to decide the controlling question, and it was not error for the court to do so. *Culligan* v. *Alpern*, 160 Mich. 241 (125 N. W. 20). Whether we say it was decided as a question of law or one of fact is not very material. Counsel for appellants insists here that a verdict should have been directed for his clients. That it would have been error to do so, I have sufficiently pointed out.

The judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

HENRY v. MICHIGAN CENTRAL RAILROAD CO.

RAILROADS—DUTY TO LOOK—CONTRIBUTORY NEGLIGENCE—INFANTS—PERSONAL INJURIES—KNOWLEDGE OF DANGER.

Plaintiff, a boy of nine years and six months, who looked only one way in crossing defendant's three tracks, and, after a train had passed on one of them, attempted to go across and was struck by a train that approached from the other direction, where he had passed over the crossing frequently, knew the danger at the same and realized that it was his duty to look out for trains, etc., could not recover for the injuries that he sustained; he should have been held guilty of contributory negligence by the trial court, as matter of law.

Error to Bay; Connine, J., presiding. Submitted October 19, 1915. (Docket No. 8.) Decided December 21, 1915.

Case by John E. Henry, by his next friend, against the Michigan Central Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed; new trial refused.

George M. Humphrey (*Cooley & Hewitt* and *Humphrey, Grant & Humphrey*, of counsel), for appellant.

Defoe, Hall & Converse, for appellee.

STONE, J. This is an action on the case to recover damages for injuries sustained by the plaintiff, an infant, suing by his next friend. The injury is alleged to have been caused on February 25, 1914, by the negligence of the defendant in the operation of one of

Digitized by Google

its engines, over Mosher street crossing, in the city of Bay City, while plaintiff was crossing defendant's tracks, about 1 o'clock p. m. of that day.

In the court below plaintiff had a verdict and judgment for $1,100, and the defendant has brought the case here for review upon a writ of error. At the time of the injury, plaintiff was 9 years and 6 months of age, and was attending the Corbin School in said city. He was a bright, intelligent boy. At the time, he was on his way to school with his younger brother, who was then about 8 years old. Plaintiff's home was some distance to the east of Mosher street crossing, and the Corbin School was six blocks to the west and south, the other side of the tracks; so that he could not go from his home to said school without crossing defendant's tracks. His home had been in the same place for 6 or 7 months. After he started, when school opened in the fall, he continued to go from his home to the school twice a day, going home for dinner, a part of the time going over the Mosher street crossing and part of the time over the State street crossing farther to the south and east. The Mosher street route was about a block the shorter. Plaintiff had crossed back and forth, just as he was doing on the day of the accident, many times, was entirely familiar with the surroundings, and had been warned by his mother concerning this particular crossing, before this day.

Mosher street crossing is in West Bay City, some distance north of the West Bay City depot, and there were three sets of tracks of the defendant's railroad over it, running approximately northwest and southeast, with about 8 feet between each set of tracks, the most easterly being the north-bound track, the middle being the south-bound track, and the most westerly track being a siding. King street, lying east of the place of the injury, runs approximately north and south, and at right angles to Mosher street. The railroad tracks

Digitized by Google

angle across both streets, and cross King street about 150 feet to the south of the Mosher street crossing, it being about 87 feet from the center of the intersection of the two streets to the most easterly rail on Mosher street, and about 107 feet from the same point to the most easterly rail on King street; and on that triangular piece of ground, bounded on the north by Mosher street, on the east by King street, and on the south and west by the railroad tracks, there is nothing except a pole upon which the sign "Railroad Crossing" is placed. The elevation of the tracks all along there is from 3 feet to 3 feet 6 inches higher than the elevation of King and Mosher streets at the point of their intersection, there being a rise in the grade of each street from the point of their intersection to the crossing of each with the tracks. The tracks run approximately straight for a considerable distance north of Mosher street, and perfectly straight for a distance of more than three blocks to the south, where there is a slight curve to the west, and all three of these tracks are used almost continuously for the operation of trains, backwards and forwards, between the yards and the depot. Mosher street runs approximately east and west, and is unpaved. Upon the day in question, some four blocks before reaching the crossing where the plaintiff was injured, he and his brother passed what is called the French School, and the schoolboys at that school threw snowballs at the plaintiff and his companion. The plaintiff and his brother threw snowballs back, and the boys from the French School began chasing the plaintiff and his brother, and chased them from the school up to the tracks, the boys following the plaintiff and his companion as far as King street, and some of them farther. Plaintiff testified that he ran up to the tracks and the boys were still behind him until he arrived at the tracks.

The line of vision of a person approaching the tracks

Digitized by Google

on Mosher street, after reaching the intersection of King and Mosher streets, is right down King street to the south, and a view of the tracks where they cross the east line of King street southerly of the center of Mosher street crossing was unobstructed. As a person proceeded west on Mosher street toward the tracks, the line of vision was across this open, triangular piece of ground. The only claimed obstruction to plaintiff's view was a bank of snow which extended about 6 or 7 feet east of the track, and to the south of the team track or traveled portion of the highway in Mosher street.

Just prior to the accident an engine pulling some cars on the middle track ran over the Mosher street crossing at from 10 to 15 miles an hour, from the north toward the depot on the south; and the engine which struck the plaintiff, having pulled a train from Detroit to Bay City, and having left the coaches in the West Bay City coachyard, was proceeding north on the most easterly track at from 6 to 14 miles an hour to the roundhouse, running with the engine tender foremost.

The noise of the approaching engine was distinctly heard by two of the plaintiff's witnesses, just prior to the accident, when they were from 50 to 100 feet farther from the engine than was the plaintiff. These two engines, the one running on the south-bound or center track from the north toward the depot, and the engine which caused the injury to the plaintiff running with the tender foremost from the depot toward the north on the north-bound, or most easterly track, passed each other just to the south of Mosher street crossing, or somewhere between that crossing and the King street crossing opposite this triangular piece of vacant land. The next street east of King street, and parallel with it, is State street, and the next street south of Mosher, and parallel with it, is Hart street.

Digitized by Google

A synopsis of the testimony of plaintiff upon his direct examination will show what he claims to have been the facts. The plaintiff testified that on this occasion, on going back to school after dinner, he went down State street until he came to Mosher street, and then went down Mosher. He testified that there were three tracks at the Mosher street crossing; that he saw an engine on that occasion as he went toward the crossing, and that, as the engine passed him southerly, he was right by the edge of the snowbank, about 6 or 7 feet away from the track—easterly track; that engine went toward State street; that he stood there and waited until it went by, and then began to cross; that when the engine went over the crossing he watched it a rod or more, and then went across; that he couldn't see it go any farther than where he watched it, because of the snowbank; that he was on the south side of the road; that when he got to King street, from there on until the crossing was reached, there was no sidewalk on the north side of Mosher street, and so he went over on the middle of the road. He testified that he did not walk on the sidewalk on the south side because it was all snow banked up; that he stood while waiting there about in the wheel tracks, a little on the south side; that he saw no other engine coming at that time, and he started ahead. He did not hear any engine come, or any bell or whistle; that he did not see what struck him. The undisputed evidence shows that the plaintiff was struck and knocked down at that point by the northwest portion of the tender just as he was passing off the west rail of the east track, and was thrown to the west and outside the track. Upon the cross-examination of the plaintiff he testified:

"*Q.* You crossed this crossing there on your way to school a lot of times, had you not?

"*A.* Yes, sir.

Digitized by Google

"Q. Going back and forth just as you were on this day?

"A. Yes, sir. There were three tracks there.

"Q. Had you ever seen trains going over there and had to wait for trains before?

"A. Yes, sir.

"Q. Did you very often have to do that?

"A. Yes; quite often.

"Q. How was it, are there lots of trains that go across the tracks there or only a few,

"A. Oh, there is a few, but pretty nearly every time I went there I would have to wait.

"Q. Pretty near every time you would go along there there would be a train around there somewhere, would there? On one of those three tracks?

"A. Yes, sir. I didn't notice whether the trains ran on only one track or on all three tracks, but I remember seeing them on different tracks, not this particular day, but I mean any time.

"Q. You do remember seeing them on different tracks?

"A. Yes, sir.

"Q. Sometimes they would be on one, and sometimes on the other?

"A. Yes.

"Q. Pretty near every day when you would go along there you would see a train on some track?

"A. Yes, sir.

"Q. Did you see trains run both ways there when going by, I don't mean this day, but when going to school there, would sometimes a train go one way and sometimes another?

"A. Sometimes there was. And sometimes they would all be going one way. This crossing is about four blocks from the French School. * * *

"Q. Had you ever noticed when you were going to school that an engine went up those tracks?

"A. Yes, sir.

"Q. Have you seen that engine before on some days, that is, an engine without any cars?

"A. Yes, sir.

"Q. When you went along Mosher street at about 1 o'clock on your way to school, did you almost always see that engine go by there?

Digitized by Google

"*A.* Almost.

"*Q.* That is from the depot up to the north?

"*A.* Yes, sir. * * *.

"*Q.* And that went by pretty near every day when you went by, didn't it?

"*A.* Yes, sir.

"*Q.* When you were on your way back to school?

"*A.* Yes, sir.

"*Q.* Did you usually go back to school about the same time every day?

"*A.* Yes, sir; I went back about the same time every day, and I tried to get there to be at school when the first bell rang. I was a little late on this day. I was quite late. We was a little late getting my dinner, I guess.

"*Q.* Were you in a hurry this day?

"*A.* Yes, sir. When I went by the French School the school boys were out around the school.

"*Q.* Did they throw snowballs at you?

"*A.* Yes, sir.

"*Q.* Did you throw snowballs back at them?

"*A.* Yes, sir. My brother was with me and helped me in my snowball fight with the boys at the school, and we threw snowballs back and forth the two of us, with the boys at the French School. I didn't know how many of those boys there were, but there were more than two. There was a whole big gang of them.

"*Q.* Were they chasing you?

"*A.* Yes, sir; they were chasing me.

"*Q.* And throwing at you?

"*A.* Yes, sir.

"*Q.* How far did they chase you?

"*A.* They chased me from the school pretty near to the tracks where I got hurt. We fought them off awhile and then had to run away from them. There were too many of them. When I ran away from them I ran until I came to Mosher street and then I turned down Mosher street.

"*Q.* Did you run down Mosher street?

"*A.* Yes, sir; and they followed me as far as King street, and then they began to go back. Some of them came farther than others.

"*Q.* They chased you farther. How far did you keep on running? Did you run clear up as far as the tracks?

Digitized by Google

"*A.* I run clear up until I had to wait for the switch engine.

"*Q.* You run clear up to the tracks, did you?

"*A.* Yes. When I got up there, there was an engine that was going across the tracks, so I had to stop and let it go by.

"*Q.* Do you know whether the boys were still after you or not at that time?

"*A.* They was after me then, too.

"*Q.* They were after you while you were waiting there?

"*A.* Yes, sir; I started on again.

"*Q.* Did you think they were still after you?

"*A.* No, sir; I did not.

"*Q.* They went back while you were waiting for this engine, did they?

"*A.* No, sir; I didn't think they was after me yet. I didn't think so.

"*Q.* But you were in a hurry to get back to school at that time?

"*A.* Yes, I was late from what I usually was, so I wanted to get back there as quick as I could. When that engine went by that I had to wait for, I did want to hurry up and get to school as quick as I could.

"*Q.* You wanted to hurry right along on down?

"*A.* Yes, sir.

"*Q.* You know that the tracks there, when you come up to those tracks that you have to be careful and look out for trains, don't you?

"*A.* Yes, sir.

"*Q.* You would have to do that every time you went across the track, had to be careful?

"*A.* Yes, sir. * * *

"*Q.* If a train hits you or a car or engine hits you, you know that it is apt to be a serious injury, don't you?

"*A.* Yes, sir.

"*Q.* You know that it might even kill you?

"*A.* Yes, sir.

"*Q.* You knew that at the time, on this day, you knew that if one of those engines or a car hit you, it would hurt you very badly, probably, didn't you?

"*A.* Yes, sir.

Digitized by Google

"Q. Now, going to school, when you got to those tracks did you use to think that you would have to be careful at those tracks so you would not be hit?

"A. No, sir; I didn't.

"Q. As a general rule when you came down there did you walk down those tracks without looking, or would you be careful not to get hit.

"A. I was looking to the north when I got hit.

"Q. I don't mean this day, but generally when you came along?

"A. Yes.

"Q. You would not walk right out onto the tracks without looking?

"A. No, sir.

"Q. You knew you had to look, so as to be careful and not get hit, didn't you?

"A. Yes, sir.

"Q. You knew that trains go by there quite often?

"A. Yes, sir * * *

"Q. Whereabouts was that snow up there?

"A. Four or five feet from the track, just so the train could get by.

"Q. Is that where you were standing, did you walk up and stand on this snow?

"A. I stood on this side of it. Right on this side of the snow as the train went by. I don't know which track the first train that went by was on.

"Q. Do you know whether it was on the track nearest to you or on the middle track or on the track farthest away?

"A. I think it was on the track nearest to me. And I stood out on the road and let the train go by nearest to me. That train was coming from the north and going towards the south. There were no cars with that engine. That was just an empty engine, going as fast as a man could run. That would be quite a little faster than I could run. * * *

"Q. When this engine went by you had to wait for just a minute?

"A. Yes, sir

"Q. And then you started right up?

"A. Yes, sir.

"Q. Which way did you look when you started?

"A. I looked toward the north.

Digitized by Google

"Q. And how far had you gone when you got hit, do you know?

"A. I don't know how far I went.

"Q. Did you see what hit you at all?

"A. No, sir; I did not.

"Q. When this engine went by you looked up toward the north and then started ahead, and the next thing you knew you were hit?

"A. Yes, sir.

"Q. Is that right?

"A. The next thing I knew I fell to the ground. The next thing I knew after that I remember somebody carrying me in the house.

"Q. When you started up did you look down toward the south at all, or did you keep looking up toward the north all the time?

"A. I looked up toward the north.

"Q. You didn't look toward the south at all?

"A. Until the train got by, I watched it go by.

"Q. The engine?

"A. Yes.

"Q. That was before you started up, wasn't it?

"A. Yes, sir.

"Q. Before you started up you saw this engine go by?

"A. Yes, sir.

"Q. If that was running faster than a man could walk, it would not take it very long to run down about a rod or so, would it?

"A. No, sir; it goes pretty quick.

"Q. I understand you to say that you watched it while it went about a rod?

"A. Yes, sir.

"Q. Now you just glanced down toward the south and then turned and looked up toward the north?

"A. Yes, sir.

"Q. And then you kept looking up toward the north until you got hit?

"A. Yes, sir.

"Q. So you did not see this engine coming from the south at all, did you?

"A. No, sir. * * *"

On redirect examination the following occurred:

Digitized by Google

"I said I watched this first engine go by me and toward the south.

"*Q.* How far could you see that after it went by? Could you tell by something here in the room so that the jury would know about how far you could see it after it went by you?

"*A.* From here to you or farther. (Here counsel agreed that the distance was 18 or 20 feet.)

"*Q.* Why couldn't you see any farther south than that?

"*A.* Because there was a big snowbank there. I stood there until the engine went by and then started across. After I stopped watching the engine at the south and started to go across the track, I looked then toward the north.

"*Q.* Had you looked back again towards the south when the engine hit you?

"*A.* No, sir."

On recross-examination he testified:

"There were no trains up to the north when I looked up to the north. It was all clear.

"*Q.* Was there anything you were looking at up there?

"*A.* No, sir. When I started, I started to walk, and I kept on walking, walking fast. * * *

"*Q.* When you went up to this first train before you stopped running, how far did you run, how close to the first train did you stop?

"*A.* Well, I ran about six or seven feet away from the first track.

"*Q.* So the engine passed up right in front of you, did it?

"*A.* Yes, sir.

"*Q.* And as quick as that got up you started right on, did you?

"*A.* Yes, sir."

We have quoted at great length from the testimony of the plaintiff in order to present the situation as he described it. The situation just prior to the happening of the accident was fully described by the witness Rosebush, a boy about 19 years of age, who, with a

Digitized by Google

comrade, was between 50 and 100 feet north of Mosher street walking down the center track toward the place of the accident. His testimony is also lengthy, and we only quote briefly from it:

Direct examination:

"*Q.* About how far would you say you were from Mosher street crossing when the accident occurred?

"*A.* About fifty feet.

"*Q.* Did you see any other train or engine at that time, besides the one that hit the boy?

"*A.* Yes, sir.

"*Q.* Tell us what you saw.

"*A.* I saw one going up on the main track south, going south on the main track.

"*Q.* When you speak of the main track, which track do you mean?

"*A.* The center track.

"*Q.* How many tracks across Mosher street at that place?

"*A.* Three.

"*Q.* And the main is the center?

"*A.* The main is the center.

"*Q.* Did you see this little Henry boy before he was hurt?

"*A.* Yes, sir.

"*Q.* Did you see him at the time this engine went south?

"*A.* Yes, sir.

"*Q.* Where did you see him?

"*A.* He was coming up the hill from right behind on Mosher street, coming up the hill. There is a kind of a hill there before you go over the track. There is a grade runs up to the track above the level of the street. At the time this engine passed him he was about twenty feet from the track, as near as I could judge. I was on the west side of the main track, so I would be upon the opposite side of the engine from him. He would be on the east side and I on the west side, and the engine would pass between us. I saw him after the engine passed. He was on the south side of the road, on the side towards the sidewalk, out where the teams go. He was in the driveway towards the sidewalk, the south side.

Digitized by Google

"Q. What did he do after this engine went south?
"A. He started to walk across the track.
"Q. How far did he get?
"A. On the west side of the engine when it hit him. He got on the west side of the first track he would have to cross.
"Q. Did you see the engine that hit him?
"A. Yes, sir. It came from the south, backing up, on the first track on the east side. That would be on the track nearest to him. I think it is called the northbound. The engine had no cars. It was just backing up with the tender on the back end, at the north end, headed toward the south or State street, and moving with the tender toward the north. * * *

Cross-examination:

"Q. If you were standing on any one of those three tracks, or a matter of four or five feet outside of either outside track, can you still see down there five blocks and see an engine coming, if you know?
"A. Yes, sir. There is a curve on the other side of State street. From where the accident took place that would be about three blocks before it starts to curve. So for two or three blocks south of where the accident took place you can see right straight down. It does not interfere with your sight at all. The distance between the tracks is about eight feet. That is, between each set of tracks. I was about fifty feet north of the crossing and saw these two boys approaching the crossing coming toward the tracks. They were coming west. They were on the east side of the tracks, coming from my left-hand side. They was on the street where the horses travel.
"Q. You spoke about their coming up the hill. How much of a hill was there there?
"A. Oh, it is a small grade, a small slant in the road, it isn't very much. They were just coming up the slant, up to the tracks when I first saw them. * * *
"Q. Whereabouts was it, that engine coming from the depot, where did it pass the one going toward the depot?
"A. That passed that one just about right on that other crossing. There are two crossings very near together there you know. They passed on the first cross-

Digitized by Google

ing just a short distance south of the Mosher street crossing. * * *

"Q. As they came up, did you see whether those boys had stopped, or were they still coming right on?

"A. I didn't notice them stop. I seen the one—just the minute that engine got by he began to look north and he started to walk across the track. When I was up about fifty feet north of the place of the accident I saw this train go by from the north to the depot. I had seen the boys before that time. I seen them before that engine went by me, on Mosher street. They was walking, when I saw them, toward the tracks. Then when the engine going to the depot went by it shut off my view of the boys. Then the next time I saw them the boys were walking.

"Q. Did you see them stop at all from that time on until this little boy got hit?

"A. No; I didn't see them. When I was looking at them before the train to the depot went by they were walking towards the tracks, and when I next looked, they were still walking towards the tracks.

"Q. He walked right up onto the track that was farthest from you, did he?

"A. Yes, sir. That track farthest over to my left.

"Q. And he was looking up toward you, you say?

"A. Yes, sir.

"Q. Did you see him look down the other way at all?

"A. No, sir.

"Q. Was his head turned very much, was it looking right straight toward you or looking across the street?

"A. He was looking right straight towards the north.

"Q. And he looked that way all the time that you saw him, did he?

"A. Yes, sir.

"Q. And he continued to walk right onto the track that was farthest to your left?

"A. Yes, sir.

"Q. Which side of the tender was it that hit him, the side nearest to you or farthest from you?

"A. Nearest to me."

Describing the snowbank alluded to by the plaintiff, this witness said:

Digitized by Google

"It went about six or seven feet I think down toward the road, toward the east. It was just a pile at the corner like where they shoveled it off the tracks, it looked to me. Put into a pile right at the corner of the street and extended six or seven feet from east to west.

"*Q.* Back of that was there any snow piled?

"*A.* I didn't notice any.

"*Q.* Was there anything that you saw except just the level road there?

"*A.* No, sir."

This evidence was corroborated by that of the witness McComb, a boy 13 years of age at the time of the trial, which occurred about 8 months after the accident. This testimony is nowhere disputed, except as to the stopping. There the plaintiff differs from this witness. Many questions are raised and discussed by appellant, which we shall not find it necessary to consider. The only question which we shall discuss is that of plaintiff's contributory negligence, which question is properly raised upon the record. We might say in passing that there was no evidence of gross negligence of the defendant.

At the close of the plaintiff's evidence, the defendant moved the court to direct a verdict in its favor for many reasons, among them being that plaintiff's undisputed evidence conclusively showed that he, himself, was guilty of negligence. In denying the motion the court said:

"In regard to the direction of a verdict, I am quite free to say that if this had been an adult who was injured there, I would consider it my duty to direct a verdict, and I am not absolutely clear whether it is not my duty to direct a verdict as this case stands, considering the age and intelligence and capacity of the boy."

It is very evident from this uncontradicted testimony, that from the time the plaintiff reached the intersection of King and Mosher streets until he reached

Digitized by Google

the easterly end of the snowbank described by him, his view to the south was unobstructed, and we have his own word for it that while traversing that space he did not look in that direction. He was entirely familiar with the crossing, having used it daily during all that school year. He knew the number of tracks, and he knew that trains ran almost constantly on all of those tracks, in both directions, and that trains might be expected on either track, or any track at any time. He knew that it was his duty to be careful. He had been warned by his mother, and he knew that he had to use care in making this crossing and watch for trains. He had before waited for trains to pass, and had watched his time to cross in safety. He also testified that he knew that almost every day, when he returned to school after dinner, an engine, without cars, ran from the depot north, just as this engine was running on this day, and he had seen it many times before. According to his own witnesses, he looked only in one direction, that was north. According to his own witnesses he did not stop, but he claims that he did. But, taking the evidence in the view most favorable to the plaintiff as given in his testimony, it is his claim that he had been chased by the boys from the French School right up to the track where he had to stop and allow the train from the north to go by, that that went by pretty rapidly, and that he only waited for that and started forward again, in a hurry. The evidence is undisputed that there was a space 3 or 4 feet between the west end of the snowbank, described by the plaintiff, and the first rail of the east track. He was struck while passing off the west rail of the east track. He had this distance, at least, of unobstructed view. The plaintiff's own testimony is that he stopped about 6 or 7 feet from the east rail. He walked this distance before being struck.

Upon this question of contributory negligence the

Digitized by Google

following request, presented by defendant, was refused:

"I charge you that it was the duty of the plaintiff, upon approaching this crossing, and after arriving at a point where he could see engines approaching, to stop, look both ways, and listen, before attempting to cross the tracks, and that failure to do any one of the three will bar his recovery."

In the case of *Gardner* v. *Railroad Co.*, 97 Mich. 240 (56 N. W. 603), this court said:

"It was broad daylight, and, when within 5 feet of the north rail of the track, it is undisputed that the plaintiff could see 250 feet east along the main track. No one disputes that, if he had but looked, he certainly would have seen the train. It is evident, therefore, that he did not look, or, if he did, he saw the train, and carelessly attempted to cross in front of it; and in either case he was guilty of such negligence as to preclude a recovery."

See, also, *Kwiotkowski* v. *Railway Co.*, 70 Mich. 549 (38 N. W. 463); *Brady* v. *Railroad Co.*, 81 Mich. 616 (45 N. W. 1110); *Grostick* v. *Railroad Co.*, 90 Mich. 594 (51 N. W. 667); *McGee* v. *Railway Co.*, 102 Mich. 107 (60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507); *Braudy* v. *Railway Co.*, 107 Mich. 100 (64 N. W. 1056); *Lau* v. *Railway Co.*, 120 Mich. 115 (79 N. W. 13).

In *Brady* v. *Railroad Co.*, *supra*, this court said:

"A person about to cross a railroad track is bound to recognize the danger, and to make use of the sense of hearing and sight to ascertain, before attempting to cross, whether a train is in dangerous proximity. If he neglects to do this, and ventures blindly upon the track, it must be at his own risk; and such conduct should be pronounced negligence by the courts, as matter of law."

So, taking the plaintiff's own theory of the case and viewing all of the evidence in the light most favorable

Digitized by Google

to him, it is apparent that he proceeded from behind this claimed obstruction to his view, under such circumstances and with such knowledge of the situation, that his conduct was negligence as matter of law. That his injury could have been avoided cannot be doubted from his own statement. If the trial court was correct, and we think it was, that plaintiff's own version of this accident clearly showed his own negligence, had he been an adult, the only remaining question is whether or not the fact of plaintiff's age, 9 years and 6 months, in view of his undisputed appreciation of the danger, understanding of the situation and general conditions, can excuse his conduct, which would clearly have been negligence in an adult under the same circumstances. It seems to us that the following cases in this court are conclusive upon that subject: *Ecliff* v. *Railway Co.*, 64 Mich. 196 (31 N. W. 180); *Henderson* v. *Railway Co.*, 116 Mich. 368 (74 N. W. 525); *Trudell* v. *Railway Co.*, 126 Mich. 73 (85 N. W. 250, 53 L. R. A. 271); *Perego* v. *Railway Co.*, 158 Mich. 225 (122 N. W. 535); *Knickerbocker* v. *Railway Co.*, 167 Mich. 596 (133 N. W. 504); *Zoltovski* v. *Gzella*, 159 Mich. 620 (124 N. W. 527, 26 L. R. A. [N. S.] 435, 134 Am. St. Rep. 752).

In the case last above cited the plaintiff, a boy about 13 years old, while playing, ran across the street without looking for any vehicle which might be coming, and was injured by an automobile driven by the defendant. Justice HOOKER said:

"Was it contributory negligence in a 13 year old boy to become so engrossed in play as to run across a city street and immediately in front of an approaching automobile without thought to look to see whether such a machine or any other vehicle was approaching? In *Henderson* v. *Railway Co.*, 116 Mich. 368 (74 N. W. 525), an 8 year old boy ran into the front end of a street car. In that case his view was more or less obstructed by a coal wagon or another car going in a di-

Digitized by Google

rection opposite to that of the car that he ran into, and which wagon or car he ran behind in his approach to the track. Mr. Justice MONTGOMERY said:

"'It was but common prudence in crossing such a thoroughfare to look, not only for the car, but for any vehicle which might be coming. Injury would have occurred from collision with an ordinary wagon just as surely as from running into this car, and from the testimony of the lad himself he had intelligence enough at the time to know this. Why, then, should it be left for the jury to say that he had not?'

"See, also, *Ecliff* v. *Railway Co.*, 64 Mich. 203 [31 N. W. 180].

"While the injury to this child necessarily arouses the sympathy of all observers, it does not warrant the imposition of damages upon one who is not shown to have been blamable in the premises. A verdict in this case would be, as the judge well said, a bestowal by the jury of 'charity from another man's pocket.'"

See, also, *Gibbs* v. *Dayton*, 166 Mich. 263 (131 N. W. 544); *Mollica* v. *Railroad Co.*, 170 Mich. 96 (135 N. W. 927); *Harris* v. *Crawley*, 170 Mich. 381 (136 N. W. 356); *Weil* v. *Railway*, 186 Mich. 614 (52 N. W. 959); *Otto* v. *Railroad Co., post*, 463 (155 N. W. 457).

This question was raised properly, and in our opinion is conclusive of the case. It is unnecessary to discuss any other questions involved.

The judgment of the circuit court is reversed, and no new trial will be granted.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

SMEDLEY *v.* MASHEK CHEMICAL & IRON CO.

MASTER AND SERVANT — PERSONAL INJURIES — VOLUNTEER — EXISTENCE OF RELATION.

On account of an alleged defective ladder that gave way with plaintiff while he was helping to put out a fire on defendant's premises, whither he had been drawn out of curiosity upon hearing the fire alarm, no recovery for injuries sustained in rendering such voluntary aid to defendant would be authorized. Plaintiff should not have been permitted to go to the jury, in the absence of any contract of hiring between the parties averred in the pleadings or shown by the proofs, and merely upon the theory that he was obeying orders of the superintendent of defendant's plant; the burden resting on an employee to prove the contract of employment relied upon.[1]

Error to Delta; Flannigan, J. Submitted October 11, 1915. (Docket No. 41.) Decided December 21, 1915.

Case by James Smedley against the Mashek Chemical & Iron Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed; new trial refused.

Keena, Lightner, Oxtoby & Hanley, for appellant.

N. C. Spencer, for appellee.

STONE, J. The facts in this case are very simple. At the time of the injury complained of, the plaintiff was in the employ of the Stephenson Charcoal & Iron Company at Wells, Delta county. Its plant adjoined the plant of the defendant company. On June 15, 1914, at 2 o'clock p. m., the plaintiff had finished his

[1] As to who is a volunteer, see note in 16 L. R. A. 861.

On the liability of master for injury to volunteer, see notes in 22 L. R. A. 664, 13 L. R. A. (N. S.) 561, 43 L. R. A. (N. S.) 187, L. R. A. 1915F, 1125.

Digitized by Google

work for the Stephenson Company and had gone home. He soon heard the fire whistle blow, and thinking there must be a big fire by the way they blew the whistle—a general alarm—he went over to the defendant's plant, "through curiosity to see what was going on." At that time the fire was burning along the tracks of the defendant company, and along the charcoal cars, and the sawdust cars. Plaintiff walked around among where the men were working at different points of the fire, and finally went up to what appeared to be the worst place at the time—the fire in the sawdust cars alongside of the storage house—and he saw them taking the hose around there, and he testified: "We tried to put out the fire." Continuing, plaintiff testified:

"I saw a man by the name of Ballard, and Mr. Roberts. Ballard is the yard foreman, or at least a foreman of the Mashek Chemical Company, and I understood Mr. Roberts was general superintendent or superintendent of the Mashek Chemical & Iron Company. They motioned for me to come and take hold of the hose. Mr. Roberts motioned. I went and took hold and helped them for perhaps a half or three-quarters of an hour, as near as I can remember, at different points of the fire around the cars and engine house. Then they put a ladder up against one of the cars. I think, as near as I recall, Mr. Roberts did it, or at least some of the men that he told. I heard him tell them to put it up. It was put there to take the hose up. The sawdust was burning inside the car, and they wanted us to go up there, as I understood, and get on top of the sawdust, and wet it down around the edge of the car to keep the car from burning. Well, I was working. There was another gentleman ahead of me, and I was helping him drag the hose up there. We had been together, and I was waiting for him to go on up the ladder and started up the ladder with the nozzle of the hose. He went up the ladder at Mr. Roberts' direction. He went up the ladder to put water on the sawdust. I don't recall, now, who the man was. I wanted to let the man go up the ladder,

Digitized by Google

and I was going to help him pull it up, and I was helping what little I could, and I was told then by Mr. Roberts to go on up there. When I started up, the man was a little past the middle of the ladder—I should judge toward the top. I had a hold of the hose. Then I started up the ladder, but I did not pull the hose. I stepped up a couple of steps, and then started to pull the hose up, and I was right within about six feet of this man. I should judge the car was 14 or 16 feet from the ground up. I started to pull this hose up, and this man ahead of me, he was just about to step on top of the car, that is, he was within a step or two of the top when I started to step up one step higher, because I heard Mr. Roberts tell another man to go up the ladder to get the hose up there, and I saw that this man was about to come up the ladder, and I made one step like that; I remember raising my foot to step up, one step up, when the ladder broke, and I fell to the ground."

Nowhere in the declaration is the claim made that plaintiff was an employee of the defendant. It is alleged that he was called upon by defendant for assistance; that the plaintiff responded to the request, and undertook to assist in and about the extinguishment of the fire; that the fire spread to the said car loaded with sawdust; that said defendant thereupon requested and directed said plaintiff to ascend the ladder; and that the plaintiff undertook to comply with said request. It is further alleged that it was the duty of the defendant to provide a ladder for the said plaintiff, which was free from defects and knot holes, and of sufficient strength to bear the weight of the plaintiff and other persons in going onto the said car of sawdust.

The plaintiff produced evidence tending to show that the ladder was defective in the particular named, to wit, because of a knot hole, and that he was injured by falling from the ladder. Mr. Roberts, the assistant superintendent of the defendant, testified that he did not hire the plaintiff for the defendant, or at all, and

Digitized by Google

that he did not give him any orders to do anything for the defendant.

The trial court charged the jury as follows:

"The first question which you naturally will consider when you go to your jury room will be whether or not the plaintiff was in the employ of the defendant company at that time. You have heard what the plaintiff claims was said to him by Mr. Roberts. You have heard what Mr. Roberts has had to say respecting the matter. It is conceded that Mr. Roberts had authority to employ the plaintiff, or any one else, to assist in putting out that fire, if he saw fit to do so. The question is: Did he employ the plaintiff, or did the plaintiff volunteer to assist in putting out that fire? In order, gentlemen, that you may find that the plaintiff was in the employ of the defendant company at that time, you must be able to say by a preponderance of evidence that Mr. Roberts intended to hire the plaintiff to work on the fire, and that the plaintiff accepted the employment. In order for the plaintiff to say he was working for the chemical company, you must find that a contract of hiring existed; in other words, you must be able to say that the minds of both parties, Mr. Roberts and the plaintiff, met at that time, and that Mr. Roberts understood that he was hiring the plaintiff, and that the plaintiff understood that Mr. Roberts was hiring him. If, as I said, the fact was that the plaintiff merely volunteered to assist in extinguishing the fire, then, no matter how the injury happened, the defendant in this case would not be liable. Now, what is the fact about that? Did the plaintiff go down there merely to look on, or did he enter upon the business of extinguishing the fire only after he understood that Mr. Roberts had hired him to assist in putting out the fire? Did Mr. Roberts himself understand that he was hiring the plaintiff, and that the plaintiff understood that he was being hired to put out the fire? In other words, did the minds of these two men get together on the contract of hiring? Unless you are able to say that, gentlemen of the jury, and to say that by a preponderance of the evidence in the case, you have finished your consideration of this case; because it would then be your duty to find a verdict for the defendant.

Digitized by Google

If the plaintiff, simply being there, entered upon the business of putting out the fire voluntarily, like you and I might, in case we rushed out to a fire, and that is all there was of it, and he was injured, he would have no claim against the defendant."

At the conclusion of the plaintiff's testimony, and again at the conclusion of all the testimony, the defendant requested the court to direct a verdict for the defendant for several reasons, among which was the reason that no relationship of master and servant was established by the plaintiff. The trial court declined to direct a verdict, and submitted the case to the jury; the trial resulting in a verdict and judgment for the plaintiff in the sum of $1,200 damages. The defendant has brought the case here for review, and, by a proper assignment of error, it presents the question above stated, among others.

The rule seems to be well settled that where, in an action for personal injuries, it is sought to charge one as master, plaintiff must show that, at the time of the alleged injury, the relation of master and servant existed between the parties. 26 Cyc. p. 1082, and cases cited. The trial court recognized the rule as appears by the part of the charge above quoted.

We have examined this record carefully, and are unable to find any evidence that warranted the court in submitting that question to the jury. There is no evidence in the case showing any contract of employment by the defendant, with the plaintiff, and in our opinion the trial court erred in submitting the case to the jury on any such theory. The plaintiff was, according to this record, a mere volunteer, and the trial court instructed the jury that:

"If the plaintiff, simply being there, entered upon the business of putting out the fire voluntarily, like you and I might, in case we rushed out to a fire, and that is all there was of it, and he was injured, he would have no claim against the defendant."

Digitized by Google

That was the real situation, and a verdict should have been directed for the defendant.

For this error the judgment of the circuit court is reversed, and there will be no new trial.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

NORTON *v.* WILLIAMS.

1. DRAINS—ASSESSMENTS—PUBLIC IMPROVEMENTS.

Act No. 254, Pub. Acts 1897, amended by Act No. 185, Pub. Acts 1911, provides for a petition by five freeholders of any county in which a drain is to be laid out, showing the necessity for it, etc., and provides upon receipt of the petition for the drain commissioner's giving notice to the other county commissioners wherein the drain may be situated and that all shall meet and take measures such as are provided by the statute and proceed as required by chapter 8. It is enacted in section 2, chap. 7, that the said commissioners shall meet and perform all duties that county drain commissioners are charged with in establishing distinct drains. In chap. 3, and the later amendment thereto (Act No. 185, Pub. Acts 1911), the drain commissioners are directed to notify the several township clerks in whose territory the drain may be located of the filing of a petition, and to designate a place for the meeting of township boards which the clerks are to call; to make a survey, etc. *Held*, that failure to notify and call meetings of the township boards was not fatal to a proceeding to establish a drain in more than one county: that there was no official action necessary for such boards to take and the acts of the commissioners were regular without having the several boards pass on the necessity for the improvement.

Digitized by Google

2. SAME—NECESSITY—EMINENT DOMAIN.
The question of the necessity and benefit of a drain which lies in more than one county is for the several commissioners. No action of the township boards is required.

3. SAME—FRAUD.
No fraudulent conduct on the part of the county drain commissioners could be inferred from the fact that they determined to establish a separate drain not including one in existence, which was not an essential part of the larger improvement.

4. SAME—CERTIORARI—JURY—TRIAL—APPEAL AND ERROR.
Upon certiorari to determine the validity of certain drain proceedings, it was essential to present competent evidence of the alleged facts that one of the jurors had been paid, in the probate proceedings, to convey the other jurors to the drain in question; mere allegations in the petition, unsupported, were not sufficient.

Error to Calhoun; North, J. Submitted October 6, 1915. (Docket No. 15.) Decided December 21, 1915.

Petition by Charles F. Norton and wife for writ of certiorari against L. Chester Williams, drainage commissioner for Calhoun county, to review certain drain proceedings in probate court. Judgment for respondent. Petitioners bring error. Affirmed.

J. M. Hatch & Son, for relators.

Stewart & Jacobs, for defendants.

KUHN, J. This is an appeal from the decision of the circuit court dismissing the writ of certiorari issued to review the action of the county drain commissioner of Calhoun county in the improvement of a drain known as the "Big Marsh Drain." It was urged in the court below, and is now urged, that:

(1) All proceedings to lay out a drain where the drain traverses more than one county are governed by section 2 of chapter 3 of the drain law, as amended by

Digitized by Google

Act No. 185, Pub. Acts 1911, which requires the action of the township board or boards before the commissioners proceed to lay out said drain.

(2) There was fraud on the part of the drain commissioner in laying out the drain in question, because the Big Marsh Drain and the Joslyn Drain constitute only one drainage system, and by separating them into two a fraud has been perpetrated on the relators.

(3) There was fraud in laying out the drain because, it is alleged, one of the jurors was employed by the drain commissioner to transport some of the jurors to view the drain.

The proceedings had and the orders made were based upon an application for "extending, straightening, deepening, and widening the Big Marsh Drain" from a point in the township of Charleston, Kalamazoo county, easterly "in the old ditch" in the township of Battle Creek, Calhoun county, to the point where it empties into the Fuller Drain.

These proceedings are governed by chapter 7 of Act No. 254, Pub. Acts 1897, section 4371, 2 Comp. Laws (2 How. Stat. [2d Ed.] § 3428), as amended by Act No. 185, Pub. Acts 1911, which chapter covers drains traversing more than one county. Section 8 of this chapter, covering improvements like the one in the instant case, provides that any five freeholders of any county, one or more of whom shall own land which at the time of the drain's construction was assessed therefor, may apply to the drain commissioner of either county, showing the necessity for the improvement. If upon examination the commissioner shall deem it necessary, etc., he shall notify the county drain commissioners of the other counties traversed, furnishing a copy of the application; and they shall "meet and jointly take such measures as are provided in this chapter relative to drains traversing more than one county, and act in like manner as provided in chapter 8 of this act in the manner (matter) of establishing (established) drains."

Digitized by Google

(Chapter 8 has to do, not with "establishing" drains, but with "established" drains, and this is doubtless a typographical error.)

Section 2 of chapter 7 provides that:

"Such county drain * * * commissioners shall, at the time and place fixed as above, meet with the county drain commissioner having the original application, and they shall thereupon and thereafter jointly take all steps, and perform all acts, and sign all papers, as county drain commissioners are required to do singly in the case of other drains, including the application to the probate court."

The steps to be taken and the acts to be performed singly in the case of other drains are set forth in chapter 3, as amended in Act No. 185, Pub. Acts 1911. Section 2, amended in Act No. 118, Pub. Acts 1909, and Act No. 185, Pub. Acts 1911, makes the following requirements of the county drain commissioners:

(1) To notify township clerks of the filing of the petition.

(2) To designate a place for the meeting of the township boards which the clerks are to call.

(3) After the favorable order of the boards is filed, to make a survey to determine the practicability of the drain.

(4) This determined, to make first order of determination.

(5) If the township board or boards should fail to agree, where there are two or more townships interested within the same county, the county drain commissioner shall determine the necessity of the drain.

Section 3 sets forth the steps which shall follow the first order of determination.

It is clearly apparent from the return of the county drain commissioner of Calhoun county that he and the county drain commissioner of Kalamazoo county determined the necessity of the improvement and made the first order of determination without having first referred the question to the township boards.

Digitized by Google

In carrying out the provisions of section 2, chap. 7, the commissioner might notify the clerks and designate a place for the meeting; but, as there is no provision in this chapter as to any function or duty to be performed by the clerks, the commissioner would thus be doing a useless thing in notifying them, which the law does not require. If it had been the intention of the legislature that the township boards should be required to meet as provided for in chapter 3, it could have clearly provided in chapter 7 that the *same procedure* should be followed as in the case of other drains.

Section 2 in chapter 7 also provides:

"That should the said county drain commissioners be unable to agree as to the necessity, location or benefit of such drain, or any * * * matter relative thereto they, or either of them, may appeal to the State highway commissioner."

This, in our opinion, would seem to indicate that the question of the necessity and benefit, as well as the location of a drain traversing more than one county, was left by the statute to the county commissioners. By section 2 of chapter 3, all the township boards are called upon to determine is "the necessity of said drain, and whether the same is necessary and conducive to public health, convenience, and welfare." It being clear that this, the only matter left for their consideration, is, impliedly at least, left with the commissioners by section 2 of chapter 7, it would follow that it was the intention of the legislature that in the matter of drains traversing more than one county there was nothing for the township boards to do.

We are therefore of the opinion that the circuit judge was correct in holding that the proceedings of the commissioners was regular without the township boards having passed upon the necessity of the drain.

With reference to the second ground urged, the learned trial judge found that:

Digitized by Google

"The holding must be against the contention of the relators, because it seems quite conclusive that the so-called Joslyn Drain is not in any way a necessary part of this Big Marsh Drain. At the hearing it was conceded by counsel for the relators that, if the proceedings as to the Big Marsh Drain can be prosecuted independent of the Joslyn Drain, then the number of signers on the petition in this case is sufficient."

We agree with the trial judge that this disposes of the second ground urged.

There is also no merit in the last ground assigned, in that there is no competent evidence in the record before us to support the assertion that any irregularity was committed in employing one of the jurors in the probate court proceedings to transport a part of the jury to the drain in question. All there is before us with reference to this is an allegation in the petition on information and belief, and no proofs are had in support thereof.

The order of the court below in dismissing the writ of certiorari is affirmed.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PONKE *v.* DETROIT UNITED RAILWAY.

1. DAMAGES—VERDICT—AMOUNT.

Upon somewhat conflicting testimony, a verdict of the jury, in a personal injury case, for $500 damages, was not excessive for a broken rib, pain in the side and leg, and a bruise on the hip, causing plaintiff to be absent from work

Digitized by Google

and confined to the bed five weeks, and to pay out $40 in expenses, so as to require the granting of a new trial.

2. SAME—EXTENT OF INJURIES—NEW TRIAL.

Held, that plaintiff's proofs were sufficient to support a verdict for that amount, on motion for a new trial, the testimony relative to the loss of time and the extent of physical injury sustained by plaintiff in dispute.

Error to Wayne; Mandell, J. Submitted October 8, 1915. (Docket No. 28.) Decided December 21, 1915.

Case by Frank Ponke against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Frederic T. Harward (*Corliss, Leete & Moody*, of counsel), for appellant.

Dohany & Dohany, for appellee.

KUHN, J. The plaintiff recovered a judgment in the sum of $500 for injuries claimed to have been received by him on October 26, 1912, while standing on the back platform of one of the defendant's cars when it was struck by another car going in the same direction. It is claimed that as a result of the collision he was thrown against the dividing rail, which broke off, and in consequence of the injuries suffered he was confined to his bed for a period of five weeks; that he did not go to work until January 3, 1913, and for two months after the accident he suffered pain; that during the time he was confined to the house the doctor called on him twenty times; and that he paid him the sum of $40 for his services. It was the contention of the defendant that the collision was an unavoidable accident, and that the books of Caille Bros., where the plaintiff was working at the time of the accident, show that at that time there were employed by Caille Bros. four people by the name of Ponke, viz., John Ponke, Dave

Digitized by Google

Ponke, B. Ponke, and F. Ponke, and that the F. Ponke is the plaintiff in this case and was away from work from October 26, 1912, to November 4, 1912. The defendant moved for a new trial on the ground that the verdict was excessive and contrary to the weight of the evidence, and appended to the motion was an affidavit of Wilford Elliott, who, it appears, was the timekeeper for Caille Bros. at the time of the accident; the substance of the affidavit being that he was personally acquainted with Frank Ponke, and that Frank Ponke's name appeared on the pay roll of the company as "F. Ponke," and that the same F. Ponke was absent from his work only from October 26, 1912, until November 4, 1912. On this appeal it is the contention of counsel for the defendant and appellant that the court erred in not granting a motion for a new trial, made on the grounds that the verdict was grossly excessive and contrary to the great weight of the evidence.

The plaintiff testified that immediately upon his arrival home after his injury he called Dr. Thomas Dowling, who, upon being sworn, testified that upon being called to treat the plaintiff on October 26, 1912, he found him in bed and suffering severe pain on his side and down the leg; that he found plaintiff had a fracture of the twelfth rib, and that there seemed to be a crepitus between the two bones where the rib was broken on the right side; that the plaintiff's right hip was bruised and swollen, and seemed to be pretty painful; that he put on bandages to hold the rib in position, which remained on between a week and two weeks; that the discoloration on the right hip remained for nearly two weeks; and that the pain in the right leg was probably due to pressure on the sciatic nerve; that he called on the plaintiff 20 times. He stated further that the plaintiff was in bed over two weeks; nearly three weeks, he thought. The records of Caille Bros. further show that F. Ponke appears to have

Digitized by Google

drawn as pay 37½ cents an hour in November and December of 1912. The plaintiff testified that he was not paid by the hour during that time, as he was working in the experimental department, and was paid by the week.

It is quite true that this record presents a case in which it is impossible to reconcile the testimony of the plaintiff and the physician with that of the defendant's witnesses. It may be, as the trial judge in denying the motion for a new trial said, either that the plaintiff had committed perjury in testifying as to the length of time he was confined to his house, or the witnesses of the defendant, the employees of Caille Bros., were mistaken as to the identity of the plaintiff. To determine the credibility of these witnesses, however, was a matter peculiarly within the province of the jury, and we are not satisfied that the verdict was against the great weight of the evidence so as to require this court to overrule the decision of the circuit judge in refusing a new trial on that ground, under the rule announced in *Gardiner* v. *Courtright*, 165 Mich. 54 (130 N. W. 322); *Fike* v. *Railroad Co.*, 174 Mich. 167 (140 N. W. 592); *Druck* v. *Lime Co.*, 177 Mich. 364 (143 N. W. 59); *McGary* v. *Motor Co.*, 182 Mich. 345 (148 N. W. 722); *Silverstone* v. *Assurance Corporations*, 187 Mich. 333 (153 N. W. 802). Neither are we of the opinion, if the jury believed the testimony of the plaintiff and his physician as to his injuries, that the amount of the verdict was grossly excessive or unreasonable.

Judgment is affirmed.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

DONOHUE *v.* VOSPER.[1]

1. DEEDS—WARRANTY—AFTER ACQUIRED TITLE—EVIDENCE—EXECUTION—ESTOPPEL.

Complainant's predecessor in title entered his claim to timber lands in the Upper Peninsula which were part of the Federal grant for railroad construction enacted in 1866. Congress subsequently declared a forfeiture of all property so granted, excepting *bona fide* homestead claims, supported by actual occupancy; also confirming title in the Lake Superior Canal Company as to a portion. Some litigation arose between the canal company and the settlers, and the United States filed a bill in equity against the company and the claimants, aforesaid, whose rights were held to depend on the *bona fides* of their homestead occupancy—a question later raised and litigated in a suit involving the attempted forfeiture. In 1896 a decree was entered determining that the company that had succeeded to the title and rights of the canal company was vested with title and that the complainants had no interest therein; and the company's rights were quieted by the final order of the court. The predecessor in title obtained a quitclaim of these corporate rights and conveyed the lands to complainant. In 1908 the complainant and defendant joined in a lease of the property for mining purposes, carrying out the provisions of a previous option. Defendants' rights were based on an alleged deed of a quarter interest from complainant, who denied its execution. *Held*, on appeal, that the evidence to impeach the deed was insufficient to satisfy the burden of proof in such cases and that the usual presumption arising from the acknowledgment should prevail; also that complainant was estopped by his deed, with the accompanying warranties, from asserting any claim upon the basis of interests secured thereafter.

2. SAME—PRESUMPTIONS—ACKNOWLEDGMENT.

The notarial certificate of a sealed conveyance carries with

[1]Removed to the Supreme Court of the United States by writ of error March 16, 1916.

Digitized by Google

it the presumption that the officer who made it certified to the truth and that he was not guilty of wrongful action.

3. SAME—DECREE—RECITALS—REAL PROPERTY.

Where the Federal decree, in addition to other findings, recited that the title to the said real property at the time of commencement of suit was vested in the canal company (passing thence to its successor), and that complainant and defendants had no rights in the lands at the time of commencing suit, the decree did not transfer any interest from complainant and his grantee to the corporation, hence, no warranties passed with the real estate to the corporation and its quitclaim deed to complainant and defendant created no rights in them by reason of any covenants of warranty in a previous conveyance. *Held*, also, that it was not because of a release contained in the decree that defendant had no title, as found by the court, but the decree determined as of the time stated that he owned no interest to be affected by the release.

4. SAME—INURING OF TITLE.

But possession of the said lands held by the warrantor necessarily inured to the benefit of the defendant when complainant later acquired title.

5. SAME—EVICTION—ESTOPPEL.

One claiming estoppel by warranty must show that he has been evicted before he can set up the estoppel by virtue of covenants in his conveyance.

6. SAME—REMEDY.

The subsequently acquired estate passes by direct operation of law without the intervention of equity or of any other court.

7. SAME—NOTICE—QUITCLAIM.

The grantee under a quitclaim deed takes with notice of any defects in his grantor's title and subject to previous unrecorded warranty deeds.

8. SAME—STATUTES—CONSTRUCTION—RETROACTIVE EFFECT.

Complainant is not aided by Act No. 199, Pub. Acts 1915, or 3 Comp. Laws, § 8988, changing the rule of law as to notice in case of conveyance by quitclaim, because nothing contained in the statute indicates the intent of the legislature to change the rule as to conveyances already made. It is a general rule that statutes are not to be con-

Digitized by Google

strued retroactively, unless it clearly appears that such was the intention of the legislative body.

9. ADVERSE POSSESSION—LIMITATION OF ACTIONS—COTENANTS—NOTICE.

If one of several cotenants, in the occupancy of lands, purposes to acquire title by hostile tenure, as against his cotenants, the proof of his denial of their right should be clear and unambiguous and must be brought home to their knowledge by express notice or by implication: the case may not be made out by inference.

10. SAME—TENANTS IN COMMON—NOTICE.

The possession of one of two tenants in common is of right and does not import adverse possession, and the presumption arising from such occupation must be overcome by conduct inconsistent with the recognition of existing rights in other tenants in common.

11. SAME—RECOGNITION—TENANTS IN COMMON—ARRESTING OPERATION OF STATUTE.

By executing with the several cotenants an option, and, thereafter, a mining lease of the holding in common, the tenant in possession recognized their rights and stopped the running of the statute as against them.

Appeal from Iron; Flannigan, J. Submitted October 11, 1915. (Docket No. 38.) Decided December 21, 1915.

Bill by Martin Donohue against Benjamin Vosper, Fred H. Abbott, Maurice J. Tonkin and the Buffalo Iron Mining Company, to quiet title to real property. From a decree for defendants, complainant appeals. Affirmed.

A. H. Ryall, for complainant.

Dan H. Ball and *Martin S. McDonough,* for defendants.

KUHN, J. The complainant seeks by his bill to quiet the title to an undivided one-fourth interest in certain land which it is the claim of the defendants was conveyed to the defendant Vosper by a warranty deed from

Digitized by Google

the complainant's grantor. This deed antedated a quit-claim deed given to the complainant by his grantor. In their answer the defendants, excepting the mining company, claimed the benefit of a cross-bill, and prayed that the title to the lands might be quieted against the complainant.

The land involved in this litigation was included in certain old grants by the United States government to the State of Michigan to aid in the construction of two railroads, one to Marquette and the other to Ontonagon. It was a part of the "common lands" at the intersection of the proposed railroads. The lands applicable to the Marquette road were released by the State to the United States, and later, in 1866, under an act of Congress (Act July 3, 1866, chap. 160, 14 U. S. Stat. p. 80), granting lands to the State for canal purposes, these lands inured to the benefit of a canal company by grant from the State. The lands to be used for the benefit of the Ontonagon road were not released, and the United States Supreme Court, in a suit hereinafter referred to, adjudged that the title to an undivided half of the "common lands" still remained in the State for the purposes of this road, except as affected by an act of Congress in 1889 (Act March 2, 1889, chap. 414, 25 U. S. Stat. p. 1008), by which Congress declared a forfeiture of grants in the State of Michigan for all unconstructed railroads, and confirmed the title of all persons who had made cash entries within the limits of those grants, and all persons claiming under State selection, such as the canal company. By an exception in the act, title was not confirmed in those lands on which they were *bona fide* pre-emption or homestead claims, asserted by actual occupation on May 1, 1888. Michael Donohue, the complainant's grantor, together with various other persons, had entered upon these common lands as pre-emptors and homesteaders.

Prior to the act of 1889 the canal company had

Digitized by Google

brought ejectment suits against these settlers. In 1890, at the instigation of persons claiming as pre-emptors and homesteaders under the act of 1889, the United States filed a bill against the canal company and others, claiming all these lands were lands of the United States and subject to entry under the homestead and pre-emption act, and prayed that the canal company be restrained from exercising acts of ownership on the land, particularly cutting timber. The canal company claimed the lands as having vested in it by the granting act and the confirmatory act of 1889, and that none of the pre-emption or homestead claims were within the exception of the latter act.

In 1894 the canal company's ejectment suit was decided by the judgment of the Supreme Court hereinbefore referred to, which adjudged that the title to an undivided half of the "common lands" still remained in the State after the release of the lands granted for the construction of the Marquette Railroad; that the title of the canal company to the lands selected to it by the State was confirmed by the Act of 1889, subject to the exceptions provided in the act; and that it should be determined in an equity suit in the United States court what lands came within the excepting clause. But by the act of 1889, referred to, the title of the State to the lands granted for the Ontonagon Railroad, including an undivided half of the common lands, was forfeited to the United States.

After the judgment in the Supreme Court of the United States, the defendant Vosper, who had defended the ejectment suit for Donohue and the other homestead and pre-emption claimants, took from Donohue a warranty deed on December 29, 1894, for an undivided quarter interest in the land claimed by him, leaving a quarter interest in Donohue and a half interest in the canal company. It is asserted by defendant Vosper that he took this deed for legal services performed.

Digitized by Google

In the suit of 1890 by the United States against the canal company, the latter filed a cross-bill against the claimants, including Donohue, claiming the title to all the land. The issue in that litigation, therefore, was whether Donohue and the other claimants were *bona fide* homesteaders or pre-emptors on May 1, 1888. On September 8, 1896, a number of the claimants, including Donohue, and Vosper claiming under him, consented to a decree, quieting title to the lands in the Keweenaw Association, Limited, successor to the canal company, which was entered on November, 1896. That decree, the effect of which is disputed and becomes important in this litigation, contained the following provisions:

"It is ordered, adjudged, and decreed * * * that the title to the lands hereinafter described, * * * at the time of the commencement of this suit, was fully and completely vested in the Lake Superior Ship Canal, Railway & Iron Company, as in part satisfaction of the grant to the State of Michigan by the act of Congress of July 3, 1866, and has, since the commencement of this suit, become, and is now fully and completely vested in said Keweenaw Association, Limited, and that neither the United States of America nor any of the defendants aforesaid, consenting to this decree, has any right, title, or interest therein.

"And it is further ordered, adjudged, and decreed that the title of said Keweenaw Association, Limited, in and to each and every of the parcels of the land hereinafter described, be, and the same is hereby, forever quieted in the said Keweenaw Association, Limited, as against the said United States of America and each and every of the said defendants in the said cross-bill hereto consenting and herein named.

"This decree shall stand and operate as a release and conveyance from the United States, and each and every of the other of said defendants, of all right and title to said lands, and may be recorded as such in the records of the proper county."

On November 19, 1896, the Keweenaw Association,

Digitized by Google

Limited, conveyed the land in suit by quitclaim deed to Donohue. It is the contention of Vosper that he and Donohue agreed to this arrangement, by which a sum of money was to be paid for the timber cut and the land was to be conveyed by the Keweenaw Association, Limited, to Donohue. On December 3, 1896, Michael Donohue delivered to the complainant, Martin Donohue, a quitclaim deed of the premises. On April 3, 1908, defendant Vosper quitclaimed an undivided one-eighth interest in the lands to the defendant Abbott, and on December 18, 1908, the complainant joined with the defendants Vosper and Abbott in the execution and delivery of an option for a mining lease of the premises. On or about February 3, 1909, defendant Abbott quitclaimed an undivided one thirty-second interest in the mineral to the defendant Tonkin, and on March 7, 1910, complainant joined with the defendants Vosper, Abbott, and Tonkin in the execution and delivery of a mining lease of the premises pursuant to the option given before. The mining lease, which was for a term of 30 years, was issued to the Niagara Iron Mining Company as lessee, and was by that company assigned to the defendant, the Buffalo Iron Mining Company. From the date of the lease until the assignment thereof to the defendant mining company, the Niagara Iron Mining Company was, and from that time forward the defendant mining company has been and is now, in possession of the premises for mining purposes.

The complainant makes the following contentions:

(1) That the deed of 1894 from Michael Donohue to Vosper, was not signed, acknowledged, nor delivered by Donohue.

(2) That the decree of 1896 entirely cut off any right Vosper may have had in the land under the warranty deed of 1894.

(3) That he was a purchaser in good faith without notice of Vosper's claim.

Digitized by Google

(4) That the record of Vosper's deed was defective, and therefore not constructive notice to the complainant.

(5) That the complainant and his grantor have been in continuous adverse possession of the land since 1883, by virtue of which he has acquired a valid title as against Vosper.

1. The first contention of complainant raises the only material question of fact in dispute in this case, as to whether the warranty deed of December 29, 1894, which purports to have been executed by Michael Donohue, was executed and delivered by him to the defendant Vosper. Complainant seeks to disprove the execution of this deed by the testimony of Michael Donohue, to the effect that he does not recollect the making of such a deed, and that he was not at Iron River on the 29th day of December, 1894, and by his testimony that both he and Michael were at Iron River on Christmas day of that year, but went back to the camp where they were working, some 10 or 12 miles away, on the 26th of December; and the testimony of Jesse Allen that Michael Donohue was cooking at the camp mentioned at or about Christmas time in 1894. Upon hearing all the testimony, seeing the witnesses, and comparing the signature on the deed with other signatures of Donohue which were fully authenticated, the learned trial judge found as a matter of fact that Michael Donohue, with full knowledge of what he was doing, and with an intention to convey as in the instrument set forth, signed, acknowledged, and delivered to the defendant a warranty deed on December 29, 1894, and that the consideration which he received therefor was valuable and adequate. After careful examination of the testimony, we are of the opinion that the complainant has not met the burden of proof which rests upon a person who seeks to deny the execution and acknowledgment of such a deed. It is a well established rule that the certificate of a notary carries with it the usual presump-

Digitized by Google

tion that the officer making it has certified to the truth, and has not been guilty of wrongful or criminal action. See *Hourtienne* v. *Schnoor*, 33 Mich. 274; *Johnson* v. *Van Velsor*, 43 Mich. 208, 219 (5 N. W. 265); *Cameron* v. *Culkins*, 44 Mich. 531 (7 N. W. 157); *Dikeman* v. *Arnold*, 78 Mich. 455, 470 (44 N. W. 407). We are therefore in agreement with the circuit judge's finding of fact as to the complainant's first contention.

2. The next contention of complainant involves the effect of the decree of the Federal court. It is urged that this decree should stand and operate as a release and conveyance from the United States, Donohue, and Vosper to the Keweenaw Association, Limited, of "all right and title to said lands;" that since the covenant of warranty in the deed runs with the land, it went with the decretal conveyance to the association with the consent of Vosper, and from the association back to Michael Donohue, in whom it was extinguished; and that Vosper therefore lost any rights which he might have had under the covenant. The difficulty with this contention, however, is that the decree in terms provides that neither Donohue nor Vosper had any right, title, or interest in the land, as it recites that Donohue, Vosper, and the United States "acknowledge that the said Keweenaw Association, Limited, is, and the said Lake Superior Ship Canal, Railway and Iron Company was, at the time of the commencement of this suit, the lawful owner in fee of the lands hereinafter described, * * * " and adjudges—

"that the title to the lands hereinafter described * * * at the time of the commencement of this suit, was fully and completely vested in the Lake Superior Ship Canal, Railway & Iron Company, * * * and has, since the commencement of this suit, become, and is now fully and completely, vested in said Keweenaw Association, Limited," etc.

Now if the title was completely in the canal company at the commencement of the suit (December 18,

Digitized by Google

1890, which antedates the time of the warranty deed to Vosper), and went from it to the Keweenaw Association before the decree, how could the decree carry any interest in the land from Donohue and Vosper to the Keweenaw Association? And we do not think that it can be contended that Vosper was adjudged to have no title *as a result* of the release clause in the decree, since there was nothing to be released if he had no interest. As was said by the learned trial judge, the right which accrued to Vosper under the breaches of the covenants of warranty found in the Donohue deed was a mere right of action for damages for the breach up to the time that Donohue acquired title under the deed to him from the Keweenaw Association, which right of action it is not claimed was transferred to the Keweenaw Association by the operation of the decree. The effect of the decree then was to oust Vosper from the land, of which he had the actual or constructive possession of an undivided quarter interest, it appearing that Michael Donohue continued in possession of the undivided one-half of the claim from the time of his original entry until his quitclaim deed to the complainant, despite the alleged trespasses of the canal company and its successor, which possession would inure to Vosper under the warranty deed. (For it must be said that Donohue was holding possession under Vosper after December 29, 1894, of the undivided quarter interest.) The decree established a paramount title in a third party, and thus evicted Vosper from his title and possession in the undivided quarter. This is important because Vosper must show an eviction before he can claim the remedy of an estoppel by the covenant of warranty in his deed. See *Matteson* v. *Vaughn*, 38 Mich. 373; Rawle on Covenants for Title (5th Ed.), §§ 131-140.

It thus becomes a clear case for the application of the doctrine of estoppel by warranty in Vosper's favor.

Digitized by Google

The rule is that a grantor who assumes to convey property by warranty deed when the title is in a third person will, together with his subsequent grantees with notice, be estopped from setting up against the first grantee an after-acquired title. The American courts have uniformly held that the after-acquired estate passes by direct operation of law, without the intervention of any court or the aid of a suit in equity or action at law on the covenants, to the covenantee. See Rawle, *supra*, § 248; Maupin on Marketable Title to Real Estate (2d Ed.), § 213. This doctrine has received the approbation of this court. *Lee* v. *Clary*, 38 Mich. 223, 226; *Fisher* v. *Hallock*, 50 Mich. 463, 465 (15 N. W. 552); *Pfirrman* v. *Wattles*, 86 Mich. 254, 258 (49 N. W. 40). Therefore, whatever title Michael Donohue acquired, by the quitclaim deed from the Keweenaw Association on November 19, 1896, passed directly to Vosper, unless the complainant can be said to be a subsequent purchaser in good faith without notice. This brings us to a discussion of the third contention of the complainant.

3. Under the decisions of this court, one who takes by quitclaim takes with notice of defects in his grantor's title and subject to previous unrecorded warranty deeds. *Peters* v. *Cartier*, 80 Mich. 124, 129 (45 N. W. 73, 20 Am. St. Rep. 508); *Beakley* v. *Robert*, 120 Mich. 210 (79 N. W. 193); *Hoffman* v. *Simpson*, 121 Mich. 502 (80 N. W. 1133); *Messenger* v. *Peter*, 129 Mich. 93 (88 N. W. 209); *Zeigler* v. *Coal Co.*, 150 Mich. 82 (113 N. W. 775, 13 Am. & Eng. Ann. Cas. 90); *Backus* v. *Cowley*, 162 Mich. 592 (127 N. W. 775); *Pellow* v. *Iron Co.*, 164 Mich. 87 (128 N. W. 918, 47 L. R. A. [N. S.] 573, Am. & Eng. Ann. Cas. 1912B, 827); *Walker* v. *Schultz*, 175 Mich. 280, 292 (141 N. W. 543).

Counsel for complainant contends that, assuming that the deed as recorded was not constructive notice to the complainant when he made his purchase, by rea-

Digitized by Google

son of a defective record, Act No. 199, Pub. Acts 1915, has changed the rule that has obtained for many years in this State relative to the standing of a grantee in a quitclaim deed, and it is his claim that the act merely establishes a new rule of evidence, which is applicable to cases arising before the act took effect as well as since. Act No. 199, Pub. Acts 1915, provides as follows:

"Every conveyance of real estate within the State, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quitclaim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof."

It is an amendment of section 8988, 3 Comp. Laws, which reads as follows:

"Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded."

We are of the opinion that the language of the amendment does not indicate that it was contemplated by the legislature that it should affect conveyances already made. The language is:

"The fact that such * * * recorded conveyance is in the form or contains the terms of a * * * quitclaim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof."

Digitized by Google

It is a rule that an act of the legislature is not to be construed as retroactive unless it affirmatively or clearly appears from the act itself that such was the intention. *Smith* v. *Humphrey*, 20 Mich. 398; *Fuller* v. *City of Grand Rapids*, 40 Mich. 395; *Maxwell* v. *Bridge Co.*, 46 Mich. 278, 287 (9 N. W. 410); *Phillips* v. *Township of New Buffalo*, 68 Mich. 217, 219 (35 N. W. 918); *In re Lambrecht*, 137 Mich. 450, 453 (100 N. W. 606); *Davis* v. *Railroad Co.*, 147 Mich. 479 (111 N. W. 76). And in our opinion it cannot be said that the act in question clearly states or necessarily implies that it is to have a retroactive effect, but rather the implication is to the contrary. We do not think it was the intention of the legislature to unsettle long-established titles, which the other construction contended for by the complainant might cause.

5. The last contention of the complainant's counsel is that the complainant and his grantor, Michael Donohue, had been in possession for more than 15 years, and therefore Vosper's title is barred. With reference to this, there is no contention between counsel as to the soundness of the legal propositions advanced by complainant, viz., that a grantor may obtain title against his grantee, and a tenant in common against his cotenant, by adverse possession. The contention of counsel for the defendants is that, while these legal propositions are well grounded, it is also true that before a tenant in common may acquire a title against his cotenant by adverse possession, the proofs must be clear and cogent, and the case cannot be made out by inference. *Yelverton* v. *Steele*, 40 Mich. 538. *Campau* v. *Campau*, 44 Mich. 31, 34 (5 N. W. 1063), is cited, where it is held by this court that:

"Such exclusive claim and denial of their right should be clear and unambiguous, and brought home to the knowledge of the cotenants, either by express notice or by implication. And if the latter, all doubt growing out

Digitized by Google

of the nature and character thereof should be against an ouster. The presumption should be that the tenant in possession respects and recognizes the rights of his cotenants, until the contrary clearly appears; that the possession is rightful, and not to the exclusion of others having equal rights."

See, also, *Rich* v. *Mining Co.*, 147 Fed. 380 (77 C. C. A. 558).

The reason for this rule, in our opinion, is apparent, because the possession itself is rightful and does not import adverse possession, as would that of a stranger. So that the presumption of occupation as a cotenant must be overcome by acts and declarations which are clearly inconsistent therewith, and which are brought home to the cotenant. Michael Donohue, at the time of his deed to Vosper, was in possession. He then conveyed to Vosper an undivided quarter and remained in possession. Martin Donohue was living with his brother at the time, and after he received the deed from Michael in December, 1896, he continued to remain there, his possession being of the same nature as that of Michael, which continued until the execution of the mining lease. Since that time the complainant has resided upon and farmed a portion of the land, being permitted to do so by the terms of the mining lease so long as his occupancy did not interfere with the mining operation.

In 1908, an application having been made for a mining option on the land, Martin Donohue claims to have first heard that Vosper claimed to have a deed from Michael Donohue of an interest in the land. He then claimed that no such deed had been made, and that he had received a letter from his brother denying that he had made any such deed. This was his first denial of Vosper's rights. But it seems to us that if he denied Vosper's title, he could not consistently join with Vosper in executing an option for a lease and the lease it-

Digitized by Google

self, unless it should be by an agreement which denied Vosper's rights. It was the opinion of the circuit judge—in which we concur—that it would be absurd to hold under the proofs in this case that, during the period from the execution of the deed to Vosper to the delivery of the Keweenaw Association deed to Michael, the latter was holding adversely to Vosper, or that Vosper knew or believed, or had the slightest reason to suspect, that Donohue repudiated his rights under his deed. During this period the things which were done on or concerning the land by complainant were as consistent with a full recognition of Vosper's title as the contrary. And until shortly before the execution of the option in 1908, no notice, actual or by implication, that the quarter interest in controversy was claimed by either Michael or the complainant was brought home to Vosper. In any event, the running of the statute was arrested by the recognition of Vosper's and Abbott's titles by the execution of the option in December, 1908, which was repeated on March 7, 1910, by the execution of the lease therein provided for.

The case of *Houlihan* v. *Fogarty*, 162 Mich. 492 (127 N. W. 793), is cited by complainant's counsel, but we think that case is readily distinguishable from the situation here presented. In that case the effect of a recital or admission of title in the lease on the running of the statute was not involved nor decided.

When Martin Donohue, in the instrument above referred to, acknowledged that he was holding possession subject to the titles of Vosper and Abbott, it is urged with reason that they had no occasion to commence any suit, as such conduct on the part of the complainant would reasonably lead them to the belief and conviction that such adverse claims had been abandoned. We are therefore of the opinion that there is no merit in the complainant's claim of adverse possession.

Digitized by Google

The decree of the lower court in dismissing the bill of complaint and quieting the title of the defendants Vosper, Abbott, and Tonkin as prayed for in the cross-bill will therefore be affirmed, with costs to the defendants.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

AUDITOR GENERAL v. NELSON.

1. TAXATION—ACREAGE—NONPREJUDICIAL OMISSION.
   The omission from the assessment roll of the number of acres in rural lands assessed for general taxes does not invalidate the tax, because no prejudice results to the owner. 1 Comp. Laws, § 3922 (1 How. Stat. [2d Ed.] § 1870).

2. COSTS—TAXATION—PROSECUTING ATTORNEY—STATUTE.
   Costs in the form of a solicitor's fee were erroneously taxed against the defendant in proceedings for the statutory decree of sale of lands for delinquent taxes (section 66, Act No. 206, Pub. Acts 1893; 1 Comp. Laws, § 3889; 1 How. Stat. [2d Ed.] § 1835).

Appeal from Muskegon; Sullivan, J. Submitted October 12, 1915. (Docket No. 58.) Decided December 21, 1915.

Petition by Oramel B. Fuller, auditor general, against Thomas M. Nelson, and other delinquent taxpayers, for the sale of lands for taxes thereon. From a decree for petitioner, defendant Nelson appeals. Affirmed.

Digitized by Google

Cross, Vanderwerp, Foote & Ross, for appellant.

Grant Fellows, Attorney General, and *Harris E. Galpin*, Prosecuting Attorney (*Galpin & Broek*, of counsel), for appellee.

KUHN, J. The auditor general of this State filed his petition in the circuit court of Muskegon county for the sale of certain lands for delinquent taxes for the year 1912, the amount of which, with interest and charges, was $212.58. The contestant and appellant filed his objection to such taxes, giving the following reasons therefor:

(1) Because the assessment roll for the year 1912 does not show the number of acres contained in said parcel of land, said parcel not being included in any town, city, or village lot.

(2) Because it appears, from the excessive valuation placed on said premises upon said roll as compared to other land in the same vicinity, that the supervisor and board of review had an erroneous idea as to the area of said parcel of land.

With reference to the second objection urged, the circuit judge said in his opinion:

"On the hearing it satisfactorily appeared to the court that this parcel of land was not assessed nor valued any higher relatively than the other parcels of land in the same vicinity and on the same assessment roll."

This objection, however, is not urged in this court, and the question that is here presented is whether or not the failure to place the number of acres actually in the parcel, in the column headed "Acres in Each Tract or Parcel," opposite the description in question, should avoid the tax.

Section 99 of the tax law (being section 1870, 1 How. Stat. [2d Ed.]) provides:

"No tax assessed upon any property * * * shall

Digitized by Google

be held invalid by any court of this State on account of any irregularity in any assessment, * * * or on account of the property having been assessed without the name of the owner, or in the name of any person other than the owner, or on account of any other irregularity, informality, or omission, or want of any matter of form or substance in any proceeding that does not prejudice the property rights of the person" assessed.

We are of the opinion, as was the learned circuit judge, that the omission of the number of acres in property described accurately on the tax roll does no harm to the property rights of the contestant, and that by virtue of the provisions of the statute above quoted the objection has no merit, and should not affect the validity of the tax.

In determining the question of costs, provided for by section 66 of the general tax law (being section 1835, 1 How. Stat. [2d Ed.]), the court said:

"Inasmuch as the court indicated to Mr. Nelson on the hearing of the case that he thought he should pay his taxes without further delay or contest, and as Mr. Nelson paid no heed to the friendly admonition of the court, and, for other reasons, it seems but equitable that Mr. Nelson should pay the costs of solicitor fee as on a motion, that is, $10, and such amount of costs will be decreed against him."

The general tax law provides that it shall be the duty of the prosecuting attorney to prosecute all such proceedings on the part of the State, and we are therefore of the opinion that it was improper to tax a solicitor's fee, as the prosecuting attorney performs these services under his salary provided for by law, and is therefore not entitled to any additional compensation. It was not therefore a proper element of the costs provided for in the statute. With this modification, the decree of the court below will be affirmed, without costs to either party.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

OSBORN *v.* CITY OF ANN ARBOR.

WATERS—MUNICIPAL CORPORATIONS—RIPARIAN RIGHTS—DIVERTING STREAM—DEMURRER—APPEAL AND ERROR.

Upon a bill in chancery to restrain a municipal corporation from diverting water by artesian wells from the neighborhood of complainant's wells, an order overruling defendant's demurrer is affirmed in order that proofs may be taken to assist the court in determining the question, because of its great importance in this State.

Appeal from Washtenaw; Kinne, J. Submitted October 14, 1915. (Docket No. 82.) Decided December 21, 1915.

Bill by Frederick Osborn and another against the city of Ann Arbor and others for an injunction. From a decree overruling defendants' demurrer, complainants appeal. Affirmed.

Andrew J. Sawyer (*John W. Dwyer* and *Arthur Brown,* of counsel), for complainants.

Frank B. De Vine (*A. F. Freeman,* of counsel), for defendants.

PER CURIAM. The bill of complaint in this cause is filed to restrain the defendant city from taking for public use water from property adjoining the property of the complainants. Complainants claim that in doing this it takes water from the complainants' property and the region thereabout, and thus destroys the value of the land, and deprives the owner of the land of the water for domestic and agricultural purposes, without condemnation proceedings, or without compensating the owner for his loss. An appeal is taken to this court from an order overruling the demurrer filed by the defendant. At the hearing of the case before us it was

Digitized by Google

announced by the court that because of the importance of the questions involved we hesitated to decide the question upon the allegations in the bill of complaint, and therefore would sustain the order overruling the demurrer, so that an answer might be filed and proofs taken. The order overruling the demurrer is affirmed.

In re KEENE'S ESTATE.

MAYNARD v. KEENE.

1. WILLS—ESTATES OF DECEDENTS—EVIDENCE—DECLARATIONS OF DECEDENT.

Where decedent, in her will, cut off her husband, against whom she had filed a bill for divorce, with a gift of $10, giving as a reason, "because he robbed me of money from time to time until I fired him out of the house, and I refused to live with him," the instrument having been lost, mislaid or destroyed, testimony tending to show the alleged state of bad feeling between testatrix and her husband was properly admitted to assist the jury in determining the issue, which was whether or not the will had been revoked.[1]

2. SAME—SUBSCRIBING WITNESS—EFFECT OF BEQUEST TO WITNESS.

Where decedent in drafting her will placed certain property in trust for two minor children of her brother, the effect of having the trustee appear as a subscribing witness did not necessarily bear on the issue whether or not the will had been executed and later revoked; nor was the validity of the bequest a question to be submitted to the jury.

[1] On evidence to establish lost or destroyed will, see note in 38 L. R. A. 433.

Digitized by Google

3. SAME—REVOCATION—DESTRUCTION OR LOSS OF INSTRUMENT.

If it is shown that after a proper search the will of a testatrix cannot be found and it cannot be traced out of the possession of deceased, the presumption of revocation may be aided by evidence of declarations made by the testatrix. The question becomes an issue of fact for the jury.

4. SAME.

Where there was evidence in the record to prove the testatrix had frequently stated to her relatives, prior to her last illness, that she had so arranged her affairs as that her brother's children should receive the bulk of her property, and there was evidence tending to show her antipathy toward her husband, the trial court was justified in submitting to the jury the testimony which had some tendency to disprove revocation as alleged by contestant.

5. APPEAL AND ERROR—NEW TRIAL—EXCEPTIONS—SAVING QUESTIONS FOR REVIEW—RECORD—BILL OF EXCEPTIONS.

The bill of exceptions in a proceeding to review, in the Supreme Court, by writ of error, the denial of a motion for a new trial, under 3 Comp. Laws, § 10504, should contain all proceedings upon such motion, including the reasons given by the trial court and exceptions taken to the refusal, and failure to do so precluded the review of the finding of the court, although counsel incorporated such exceptions in the printed record.

Error to Muskegon; Sullivan, J. Submitted October 15, 1915. (Docket No. 113.) Decided December 21, 1915.

Frank Maynard presented for probate the alleged will of Alice Maynard Keene, deceased, and Gust Keene, contestant, appealed to the circuit court. Judgment for proponent and contestant brings error. Affirmed.

Sutherland, Johnson & Sessions, for appellant.

Dunham & Dunham, for appellee.

KUHN, J. The decedent, Alice Maynard Keene, at the time of her death had been a resident of the city of

Digitized by Google

Muskegon for approximately 20 years. During that time she had accumulated considerable real estate, and had been proprietress of several houses of questionable reputation in that city. She had a brother, Frank Maynard, who was married and had three children. She had known the contestant, Gust Keene, her husband, for many years before he came to Muskegon in 1907, and married him in Chicago in 1911. She lived with him until May, 1912, when they separated. In July she filed a bill for divorce against him in the circuit court for the county of Muskegon, which was dismissed in April, 1913, by the trial court after hearing the testimony. In November, 1913, she commenced another suit in the circuit court in the county of Kent against him for divorce, which apparently was pending at the time of her death.

In the year 1900 she had a will prepared, by the terms of which her property went to her brother, with certian provisos, and in the fall of 1912 she went to the office of Mr. John H. Banninga, who is the manager of a real estate company in the city of Muskegon, and asked him to prepare a will for her. Mr. Banninga, who had advised her for several years concerning some of her business matters, met her by appointment, and after she produced her old will he took a blank form of will and made a lead pencil memorandum or copy of what she wanted. On the next evening a pen and ink copy was made, and that evening the decedent again came to his office, where the will was read over to her, and while waiting for a person who had been asked to be a witness of the will, she also read it over. Subsequently a Mr. Matthew H. Steiner was called in and, together with Mr. Banninga, witnessed the will, which was signed and executed that evening. The will was then put in an envelope and sealed and locked in a box in a vault of the Wood Real Estate Company, and the old will was at that time de-

Digitized by Google

stroyed and put in the stove by the decedent. It appears from the testimony that during these two visits to Mr. Banninga's office she stated that she wanted the property to go to her brother's children, as her brother, Frank Maynard, was the victim of a drug habit, and that her husband had robbed and abused her, and that she had been compelled to file a bill for divorce against him.

In November, 1913, she again went to the office of Mr. Banninga and told him that she was going to Waterloo, Iowa, where her brother, Frank Maynard, was living; that she wanted to take the will with her in order to show them how she had disposed of her property, and reiterated her hatred toward her husband. While in Waterloo she read the will over to Mrs. Maynard, who saw it, and whom she told that the children would get practically all the property, and that she wished the children to be sent to a convent. Mrs. Maynard also testified that the decedent was apparently not on friendly terms with Mr. Keene, as she did not speak kindly of him at all, but used profanity when talking about him. The decedent arrived in Waterloo about three weeks before Thanksgiving, and on the Saturday before Thanksgiving she left Waterloo for Chicago, intending to go from Chicago to Grand Rapids. After arriving in Chicago she wrote her brother from a hotel and requested him to send the baggage check for her trunk, which had not left on the same train that she had. This was the last heard of her by her family until a few days later, when Frank Maynard received a telegram from Grand Rapids that she was dead. She died in the home of Mrs. Mamie Burress, where she spent about eight days, and was sick practically all the time she was there. After her death no will was found, and upon petition of Frank Maynard a special administrator was appointed in December, 1913. In June, 1914, Mr. Banninga discovered the

Digitized by Google

old pencil copy of the will, which he had made, in his desk, and a petition was then filed in the probate court for the county of Muskegon to establish this lost will. It was duly certified to the circuit court, where it was brought on trial, and the will established by the verdict of the jury, and judgment entered thereon.

The first group of assignments of error relate to testimony which was received over objection, admitted for the purpose of showing the alleged enmity that Mrs. Keene had in her lifetime toward her husband, the contestant. The will contained the following bequest:

> "I give, devise, and bequeath to my husband, Gust Keene, the sum of ten ($10.00) dollars, or the sum of one hundred ($100.00) dollars [the $100 is then scratched out, and ten written above it], and no more, because he robbed me of money from time to time, until I fired him out of the house, and I refused to live with him."

It is practically undisputed in this case that the will in question was made, and the real question in dispute was whether or not it had ever been revoked. We think that the testimony here objected to was competent as bearing upon the question of the revocation of the will.

The bulk of the property, by the terms of the will, was bequeathed to the children of Frank and Nellie Maynard, to be held in trust by the executor named in the will until said children reached the age of 21 years, if the executor deemed best. John H. Banninga was named as executor, and also was one of the subscribing witnesses thereto.

The trial court denied a request to charge the jury that the bequest in trust to John H. Banninga for the children of Frank and Nellie Maynard was void because he is one of the two subscribing witnesses to the will, and instructed the jury as follows:

Digitized by Google

"In relation to John H. Banninga having been mentioned in the will, or the copy that is said here, as the executor or as trustee, as far as that is concerned, that does not make any difference, excepting, perhaps, the weight to be given to his testimony. If he actually subscribed the will, and Steiner subscribed the will, and Mrs. Maynard subscribed the will, what effect that may have upon the will is not for the jury."

Reliance is placed by counsel for the appellant upon section 9268, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10981), which provides:

"All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto, shall be wholly void, unless there be two other competent subscribing witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts, shall not prevent his creditors from being competent witnesses to his will."

We do not think it is necessary at this time to determine whether the vesting of this property in Mr. Banninga as trustee for such a period is such a beneficial interest given by the will as to bring it within the prohibition of the statute above quoted. The questions here for the jury to determine were whether or not such a will had been legally executed, and whether it had been revoked. We agree with the instructions of the trial judge that the question of the validity of this bequest was not a proper matter for the jury to consider in the case before them.

It is the claim of the appellant that a verdict should have been directed for the contestant after the proponents had rested their case, and that no competent testimony was introduced to outweigh the presumption of revocation which arose because of the failure to discover the will. It is without question the rule of law that, where a will cannot be found at the death of the testator upon proper search being made, and especially where the will is not traced out of the possession of

Digitized by Google

the testator, it is to be presumed that it was destroyed by him *animo revocanda*. But it is also established in this State that this presumption of revocation can be met by declarations of the testator. It was said in *Ewing* v. *McIntyre*, 141 Mich. 506, 517 (104 N. W. 791):

"But counsel for contestants contend that the declarations of the testator were not competent evidence to rebut the presumption of revocation, and that the great weight of current authority is to that effect [citing numerous cases].

"We do not deem it necessary to enter upon a discussion of the authorities to determine on which side the weight of authority lies, since the rule has been established in this State against contestants' contention. *Lawyer* v. *Smith*, 8 Mich. 412 [77 Am. Dec. 460]; *Harring* v. *Allen*, 25 Mich. 505; *In re Hope*, 48 Mich. 518 [12 N. W. 682]; *In re Lambie's Estate*, 97 Mich. 50 [56 N. W. 223]; *Cheever* v. *North*, 106 Mich. 390 [64 N. W. 455], 37 L. R. A. 561 [58 Am. St. Rep. 499]."

It was also said in *Re Foerster's Estate*, 177 Mich. 574, on page 585 (143 N. W. 616, on page 620):

"Whether or not the presumption of revocation is rebutted is a question for the jury. Thornton on Lost Wills, § 73, citing cases."

There is evidence in this record to show that from the time that the testatrix executed the will until she lay upon her deathbed, she told her friends and relatives that she had had her affairs so arranged that her brother's children would get the bulk of her property. Mrs. Burress, at whose house she died, testified:

"She said she had things fixed in case anything happened to her, and that it would go to her brother's children, and she spoke especially of Olgy, the oldest one. She seemed to be more in favor of him.

"*Q.* But she said that it would go to her brother's children?

"*A.* Yes; her brother's children. She did not speak anything about him or about his wife to me.

Digitized by Google

"*Q.* I will ask you whether or not she said that to you the day she died?

"*A.* Yes; she did.

"*Q.* And whether or not she said that to you several times before that.

"*A.* Several times; there was not a day that she did not talk about it."

Considering also her repeated statements concerning her husband, the contestant, which showed a feeling of antipathy on her part toward him, the fact that at the time of her death divorce proceedings were pending, we are of the opinion that the testimony raised a question of fact which we think the trial judge was clearly justified in submitting to the jury.

The counsel for contestant made two motions for a new trial; the second motion being accompanied by various affidavits and supplemental affidavits. Both these motions were denied by the trial judge, and the denials of these motions are assigned as error by proper assignments. Neither the motions for a new trial, nor the orders denying the new trial, nor the affidavits in support of the second motion for a new trial, nor the exceptions to the findings of the court denying a new trial are made a part of the bill of exceptions, but are found in the printed record. The only reference thereto in the bill of exceptions certified to by the trial judge is his statement giving the reasons for the denial of the second motion for a new trial. Counsel for appellee contend that under the decisions of this court the exceptions to the denial of the motion for a new trial, not being in the bill of exceptions as certified to by the trial judge, are not properly a part of the record, and should not now be considered, and attention is called to the statute (section 10504, 3 Comp. Laws) which reads as follows:

"SECTION 1. *The people of the State of Michigan enact,* That in all cases hereafter taken to the Supreme Court on writ of error or appeal, where a motion for a

Digitized by Google

new trial has been previously refused by the trial judge, the party appealing the same may incorporate in the bill of exceptions a record of all proceedings had on said motion for a new trial, including the reasons given by the trial judge in refusing to grant said new trial. Exceptions may be taken and error assigned on the decision of the circuit judge in refusing such motion, and the same shall be reviewed by the Supreme Court."

Stevens, in his work on Michigan Practice, says with reference to the preparation of the bill of exceptions (Vol. 2), on page 476:

"The denial of a motion for new trial may, since the statute of 1893, be set forth in a bill of exceptions, for review by the Supreme Court. In such case 'a record of all proceedings had on said motion for a new trial, including the reasons given by the trial judge in refusing to grant said new trial,' may be incorporated. The bill of exceptions should contain: (1) The motion and the affidavits filed in support of and against it; (2) the order denying the motion and the reasons given by the trial judge for its denial; (3) the exceptions taken by appellant to the denial. While all these documents are a part of the records and files of the cause, the statute seems to contemplate that they shall be incorporated in the bill of exceptions."

See, also, 2 Green's Michigan Practice (3d Ed.), p. 1145.

We are of the opinion that the author has come to the right conclusion in saying that it is apparent from a reading of the statute that the exceptions to the denial of a motion for a new trial and all proceedings with reference thereto should be incorporated in the bill of exceptions. Counsel urge that, because these various papers are printed in the printed record here filed, that is sufficient, because in various decisions of this court the word "record" is used indiscriminately with the words "bill of exceptions" in holding that the reasons for denying a motion for a new trial must be in the record. However, it must be clear that, when

Digitized by Google

the word "record" was used in these decisions, it could only be said to refer to such documents and proceedings as are properly a part of the record for review in this court, and not to what counsel may see fit to have printed in the printed record. Here, clearly, an attempt was made to assign error upon exceptions which are not in the bill of exceptions certified to by the trial judge, and we therefore must refuse to consider assignments of error based thereon.

This court said, in *Stevenson* v. *Railway Co.*, 118 Mich. 651, 653 (77 N. W. 247):

"Under Act No. 134, Pub. Acts 1893, providing that there may be incorporated in the bill of exceptions a record of the proceedings on motion for a new trial, including the reasons for the refusal thereof, and that exceptions may be taken and error assigned thereon, the action of the court cannot be reviewed in the absence from the bill of the reasons therefor and exceptions to the decision. *McRae* v. *Garth Lumber Co.*, 102 Mich. 488 [60 N. W. 967]."

See, also, *Pearl* v. *Township of Benton*, 136 Mich. 697 (100 N. W. 188); *Wilbur* v. *Railroad Co.*, 145 Mich. 344, 351 (108 N. W. 713); *In re Meeker's Estate*, 169 Mich. 303, 306 (135 N. W. 248).

Finding no error in the assignments of error properly before us for consideration, we are constrained to affirm the judgment.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

GILECKI v. DOLEMBA.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE.
In an action for malicious prosecution, the question of want of probable cause is for the court if the facts are undisputed.[1]

2. SAME—CRIMINAL PROSECUTION—WANT OF PROBABLE CAUSE.
Probable cause is such reasonable ground of suspicion, supported by known circumstances, or by information of sufficient character, to justify an ordinarily cautious person in believing that the accused is guilty of the alleged crime.

3. SAME—EVIDENCE—DIRECTED VERDICT.
Where the defendant displayed in the presence of plaintiff, a stranger, a large roll of money which he placed in an unlocked trunk in the lower part of the house, plaintiff being in a position to see the act, and where there was evidence that he was informed by a roomer that some one crept stealthily downstairs in the night and after moving about went outside, that the person coughed like one of the roomers with whom plaintiff was friendly, and that the dog belonging to defendant had been put outside in the night, that plaintiff and the roomer had entered the house together, where, also, defendant related all the facts to a justice of the peace who issued a warrant, the question of probable cause, upon uncontradicted evidence, was for the court, which rightly held that there was no proof of a want thereof.

OSTRANDER, J., dissenting.

Error to Gogebic; Cooper, J. Submitted October 15, 1915. (Docket No. 122.) Decided December 21, 1915. Rehearing denied April 21, 1916.

Case by John Gilecki against Joseph Dolemba for malicious prosecution. Judgment for defendant. Plaintiff brings error. Affirmed.

[1]Whether the question of probable cause in malicious prosecution is a question for court or jury is discussed in an extensive note in L. R. A. 1915D 1.

Digitized by Google

Julius J. Patek, for appellant.

Curtis Buck (*Belmont Waples*, of counsel), for appellee.

KUHN, J. The defendant herein, on December 5, 1913, made a written complaint against the plaintiff, charging him jointly with one John Pazara with the larceny of $300 of the defendant's money. A warrant was issued for the plaintiff's arrest, and he was taken in custody and remained in custody in default of bail until the 10th of that month, on which day the case was dismissed by the prosecuting attorney for want of sufficient evidence.

This action is brought for malicious prosecution, and at the close of the plaintiff's evidence the trial judge directed a verdict in favor of the defendant on the ground that under the undisputed facts in this case the evidence wholly failed to show as a matter of law a want of probable cause, and also wholly failed to show any malice on the part of the defendant. The facts are in substance as follows:

On the evening of December 4, 1913, the plaintiff met Frank Dolemba, a brother of the defendant, and one John Pazara in a saloon, where Dolemba and Pazara bought some wine. Dolemba and Pazara both roomed at defendant's house, while plaintiff roomed a short distance away. On the way home, Frank Dolemba and Pazara invited the plaintiff to go to the defendant's home with them, which he did, and there drank some wine with them. It was the first occasion on which the plaintiff had been in the defendant's house. While the plaintiff was in the house the defendant displayed a considerable amount of money, upwards of $300, and in the presence of the plaintiff, and where the plaintiff could see him, he placed the money in a trunk in another room, not locking the trunk. The defendant then retired for the night, his wife visiting

Digitized by Google

with the plaintiff and Pazara. Later the wife retired. The plaintiff then went to his own house, and Pazara also retired for the night.

A brother of the defendant, who was living with him, came in later, locked the front door, and went to bed, and at that time the defendant's dog was in the house. But in the morning he found that the dog was on the outside of the house. He was also told the next morning by a woman who lived in another part of the house that she heard some one come softly downstairs about 3 o'clock in the morning, move around stealthily, then go out of doors for a time, then come back, and that he coughed like Pazara.

The loss of the money was discovered in the morning by the defendant's wife, and the defendant thereupon went at once to the office of the prosecuting attorney of the county to lay the facts before him, but failed to find him, as it appears that the prosecutor was away at the time. He then went to a justice of the peace, and told him the facts as he knew them, and signed the complaint upon which the warrant was issued. This complaint and warrant form the basis of this action.

It is the settled rule in this State that when the facts are conceded, the want of probable cause is a question of law to be determined by the court, and therefore the trial judge acted properly in making such a determination. *Huntington* v. *Gault*, 81 Mich. 144 (45 N. W. 970); *Rankin* v. *Crane*, 104 Mich. 6, 9 (61 N. W. 1007); *Fine* v. *Navarre*, 104 Mich. 93 (62 N. W. 142); *Slater* v. *Walter*, 148 Mich. 650 (112 N. W. 682). The question before us, therefore, is whether or not he erred in determining that the facts herein set forth were insufficient to show a want of probable cause.

In determining this question, it is necessary to bear in mind that to constitute probable cause there must be such a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to war-

Digitized by Google

rant an ordinarily cautious person in believing that the person arrested was guilty of the offense charged. *Gallaway* v. *Burr*, 32 Mich. 332; *Hamilton* v. *Smith*, 39 Mich. 222; *Spalding* v. *Lowe*, 56 Mich. 366 (23 N. W. 46); *Wilson* v. *Bowen*, 64 Mich. 133 (31 N. W. 81).

Taking the situation as it presented itself to the defendant when the loss of the money was discovered, the fact that the plaintiff and Pazara came to his house together, where the former had never been before, that he there saw the money displayed and could see where the defendant placed the money, the fact that it appeared that somebody had come into the house after the brother had retired for the night, in our opinion, warranted the defendant, in the exercise of ordinary prudence, in believing that Pazara and the plaintiff were connected with the disappearance of the money, and we therefore conclude that the circuit judge was right in holding that the evidence wholly failed to show a want of probable cause in the taking out of the complaint and warrant against the complainant in this case; and, further, that there is no evidence of malice shown on the part of the defendant.

The judgment of the lower court will therefore be affirmed.

BROOKE, C. J., and PERSON, STONE, BIRD, MOORE, and STEERE, JJ., concurred with KUHN, J.

OSTRANDER, J. (*dissenting*). I think the case was one for the jury.

Digitized by Google

SPIEGEL v. BARRETT.

1. MUNICIPAL CORPORATIONS—DRAINS—CONSTRUCTION—BREACH OF CONTRACT—ASSUMPSIT.

Under the drainage law of the State of Michigan, special assessment districts formed in the construction and assessment of a drain lying within two adjacent counties are not public corporations and have no power to sue or to be sued; they are created simply for the purpose of collecting taxes from the land which benefits by the construction of the improvement and the money raised for the drain cannot be diverted to any other purpose.

2. SAME—STATUTES—COUNTIES—JUDGMENT.

Under section 2471, 1 Comp. Laws (1 How. Stat. [2d Ed.] § 953), judgments recovered against county officers may be spread against the entire county, but in case of a drainage district including portions of two counties, the statute could have no application.

3. SAME—CONTRACTS—DAMAGES—TAXATION.

Since the county has no interest financially in the construction of a drain, and the cost is required to be paid by property owners within the assessment district, damages for breach of a contract and for work done under such contract could not be assessed against the county as a whole.

4. SAME—ASSUMPSIT.

Accordingly, an action of assumpsit does not lie against the drain commissioners of two counties in which a district is situated and plaintiff's remedy for money due under his contract, and for loss of profits thereunder, would be a different form of procedure.

Error to Shiawassee; Miner, J. Submitted October 4, 1915. (Docket No. 93.) Decided December 21, 1915.

Assumpsit by Frederick F. Spiegel against James

Digitized by Google

Barrett, drain commissioner of the county of Saginaw, and another, for breach of contract and for a balance due thereon. Judgment for defendants. Plaintiff brings error. Affirmed.

W. J. Parker and *R. L. Crane,* for appellant.

Bird J. Vincent, Prosecuting Attorney, *Seth Q. Pulver,* Prosecuting Attorney, and *Joseph H. Collins,* for appellees.

KUHN, J. This action is brought in assumpsit by the plaintiff against the drain commissioners of Saginaw and Shiawassee counties, Mich., in their official capacities. It appeared that at the time of the hearing the defendant James Barrett was no longer commissioner of Saginaw county and was succeeded by Emil Roethke, who was substituted by an amendment as a defendant in the place of Barrett. On September 29, 1911, the plaintiff entered into a drain construction contract with the predecessors of the present defendants for the construction of certain sections of the Griffus Creek drain located in the townships of Brant and Brady, Saginaw county, and Rush, in Shiawassee county, the date of the completion of this contract being fixed as January 1, 1912, and one of the provisions being that:

"The contractor hereby agrees to begin work within ten days and keep the same up without delay until the completion of this job, condition of weather excepted."

The next summer was exceedingly wet, and the work was continued during 1912 and 1913, and various payments were made on the contract. It is also claimed that in the spring of 1914 it was agreed that the plaintiff was to begin as early as possible and complete the drain during the summer of 1914. But during March of the same year notice was served on the plaintiff by

Digitized by Google

the commissioners that they would forfeit his contract on the 7th of April, 1914, at the office of the drain commissioner at Saginaw, because of the noncompletion of the work within the time specified and allowed for in the contract for the construction of the drain. On the 7th of April, 1914, a meeting was held at the office of the county drain commissioner of Saginaw county, the plaintiff appearing before the commissioners, and notice of forfeiture was thereupon served on the plaintiff. It appears that at least a portion of the drain has not been completed in Saginaw county, and that no work at all has been done on the part of the drain lying in Shiawassee county. The plaintiff claims in this suit a sum of money owing him for work which he claims is completed, and also claims a sum due him as loss of profits which he claims would have accrued had he been permitted to continue and complete said contract. At the close of the opening statement of counsel for the plaintiff, a motion was made on the part of the defendants for a directed verdict, for the reason that the action was not properly founded and could not be properly brought against the drain commissioners in their official capacities, which motion was granted. The real issue in the case is, therefore, can such an action be laid against the commissioners in their official capacities by a contractor for money earned upon a contract? and also can prospective profits be recovered in assumpsit against the commissioners if the commissioners acted wrongfully in declaring a forfeiture?

This being an action in assumpsit against the drain commissioners in their official capacities, we are of the opinion that the plaintiff is mistaken in the form of the remedy. It is the contention of the plaintiff's counsel that it should be held that the drain commissioner in making these contracts is the agent for the lands liable to assessment for constructing the drain.

Digitized by Google

But this contention presents to our minds insurmountable difficulties. Under our drainage law, the special assessment drainage districts are not corporations, as have been created in certain States—Illinois, for example—where the statute bestows powers to contract and be contracted with, to sue and be sued, upon such districts. Here they have no corporate entity, and are created simply for the purpose of collecting taxes from the benefited land for the construction of the drain. There is no provision in the law providing for the certifying of the judgment on a claim such as is made in the instant case, nor providing for the spreading of such a judgment in the form of a tax upon the lands in the drainage district. It is clear from reading the act in question that the sole purpose of the drain tax is to complete a drain, and the law will not permit such funds to be paid out for any other purpose. Section 2471, 1 Comp. Laws (1 How. Stat. [2d Ed.] § 953), provides:

"When judgment shall be recovered against the board of supervisors or against any county officer in an action prosecuted by or against him in his name of office, no execution shall be awarded or issued upon such judgment, but the same, unless reversed, shall be levied and collected as other county charges, and when so collected, shall be paid by the county treasurer to the person to whom the same shall have been adjudged, upon the delivery of a proper voucher therefor."

This statute does not apply, however, because by virtue of its terms the judgment would be spread against the whole county, and under the circumstances of this case it would run against both counties. The county as such has no interest financially in the construction of a drain, as the cost of the drain is paid by the benefited property owners within the special assessment district, and it would certainly be an improper procedure, and unjust, to require the people of the entire county to bear the cost of the construction of a drain

Digitized by Google

where only a small part of them could be said to have been directly benefited thereby. It is clear, therefore, that there is no legal method by which judgment in such a case could be satisfied. And to take judgment against an officer when no means is provided for to collect it would be indeed an idle ceremony.

A somewhat similar and analogous situation was presented to the court in the case of *Pape* v. *Township of Benton,* 140 Mich. 165 (103 N. W. 591). Under section 2, Act No. 173, Pub. Acts 1897, it is provided that upon the request of an overseer of a highway within a township, and upon petition of the majority of the taxpayers of such highway district, the highway commissioner of the township may purchase a road machine for such district. The law also provides for a certification of the amount to be spread as a tax, certifying the names of the persons and the descriptions of the land against which the tax is to be levied. A road machine was sold under a contract claimed to have been entered into under this statute, and the plaintiff sued the defendant township in assumpsit for the balance claimed to be due him thereon. Mr. Justice MCALVAY, in writing the opinion of the court, said:

"The only question before the court is whether assumpsit will lie against defendant in this case. * * * It is evident from a reading of the two sections that the first provides for these contracts to be made with townships; that in the second the legislature, in providing a means whereby road districts in a township might purchase a road machine, recognized that such districts were not municipalities which could assume obligations, and sue and be sued, and provided a way of payment for this implement necessary in the construction and maintenance of highways, through the provisions of the statute. No proceeding is necessary to determine the amount of such indebtedness. That amount is fixed by the proper township officers, who certify to the board of supervisors. The contract fixes

Digitized by Google

the purchase price. Payment can be made only through official channels. Everything is a matter of record. At no time can the balance due be a matter of doubt. The township is not primarily liable. No contract relations exist between the seller of the road machines and the township. The paving cases cited by appellant are not in point. In each the municipality had assumed the liability by contract or otherwise. The duties required to be performed under this statute by the several officers are, in their nature, ministerial. This court has held repeatedly that mandamus is the proper remedy to compel an officer to perform a ministerial duty. In this case, the remedy of plaintiff in case of refusal on the part of these officers to act in the premises was by mandamus."

It is argued by counsel for the defendants—and it seems to us with force—that the county drain commissioner occupies a position with respect to the special drainage districts in the county somewhat analogous to that occupied by the highway commissioner of the township with respect to the road districts in the township. Neither of these districts has any corporate life, neither is a municipality created by the statute, and neither has any authority granted it to assume obligations or to sue or be sued. In each case, they exist simply for one purpose, and the money raised for them cannot be diverted to any other purpose; the funds so raised must be paid out in the exact method provided for by law.

We are of the opinion that the circuit judge was correct in holding that the plaintiff could not bring an action in the manner in which he has sought to bring it here, and the judgment is therefore affirmed.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

MORRISON v. CITY OF IRONWOOD.

1. APPEAL AND ERROR—DIRECTED VERDICT—SNOW AND ICE—MUNICIPAL CORPORATIONS.

In determining whether or not the trial court erred in directing a verdict against plaintiff, who was injured by falling into an excavation in accumulated snow and ice, in the streets of a city, the evidence must be considered in that light which is most favorable to the claim of the plaintiff.

2. NEGLIGENCE—PROXIMATE CAUSE—GENERAL DEFINITION.

A cause is proximate if it operates to produce particular consequences without the intervention of any independent unforeseen cause, but for which the injuries would not have occurred.[1]

3. MUNICIPAL CORPORATIONS — EXCAVATION — STREETS — CITIES —SNOW, ACCUMULATION OF—NEGLIGENCE.

A pedestrian, who fell into a temporary ditch, laid across the crosswalk, in ice and snow, that had accumulated to a depth of fifteen inches and upwards on a city street, where the danger was concealed by a light snowfall, and was unknown to the plaintiff, was entitled to have the verdict of the jury on the questions of negligence and proximate cause, the testimony showing that snowstorms were and should have been anticipated when the ditch was built.[2]

4. SAME — TORTS — REASONABLE CARE — NEGLIGENCE — PROXIMATE CAUSE.

To render a negligent act the proximate cause of the alleged fall, it was not essential that the persons who constructed the ditch might have foreseen the particular consequence or injury, or manner in which it took place, if by an exercise of reasonable caution it might have been anticipated that some injury might occur.

---

[1]On defect in highway as proximate cause of injury, see notes to 13 L. R. A. (N. S.) 1252, 20 L. R. A. (N. S.) 732.

[2]As to an obstruction in highway as proximate cause of injury notwithstanding intervening cause, see note in 9 L. R. A. (N. S.) 548.

Digitized by Google

Error to Gogebic; Cooper, J. Submitted October 13, 1915. (Docket No. 69.) Decided December 21, 1915.

Case by Julia Morrison against the city of Ironwood for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

James A. O'Neill, for appellant.

Harry K. Bay, for appellee.

KUHN, J. The plaintiff, a woman 53 years of age, on the morning of March 17, 1914, while walking westerly on Ayer street in defendant city, and while crossing the crosswalk on the south side of that street where it is intersected by Lowell street, stepped into a temporary drain dug in the snow, causing a fall from which she received serious injuries. The streets at the place of the accident are paved, the pavement extending over and constituting the crosswalks, and during the winter months, when large quantities of snow and ice accumulate on the streets, it is spread out by the city employees, and when traveled upon becomes smooth and hard, and constitutes the surface of the streets and crosswalks.

At the time of the accident the accumulation of the snow and ice on Ayer and Lowell streets at the place where the plaintiff sustained her injuries was upwards of 15 inches deep, being smooth and level, having been traveled upon during the previous winter. Shortly before the date of the injury the street commissioner of the defendant city, who had charge of the street work, and whose duty it was to keep the streets, sidewalks, and crosswalks in proper condition and repair, caused a ditch to be constructed across the crosswalk on the south side of Ayer street where that street is intersected by Lowell street. There is some dispute in the record as to how this ditch was constructed and as to

Digitized by Google

its dimensions; but, in view of the fact that a verdict was directed at the close of the plaintiff's proof for the defendant, in the consideration of the questions involved in this appeal it will be necessary to consider the evidence in the light most favorable to the plaintiff's theory. We find that there is evidence which tended to prove that this ditch was from 12 to 15 inches in depth and about a foot in width, with perpendicular, abrupt sides, and extended directly across the crosswalk at a point about 2 or 3 feet from the edge of the sidewalk. These ditches were usually dug to permit the water to run into the sewer, and to drain the water off the sidewalk in anticipation of the thaw which would come later.

It snowed on the afternoon and evening prior to the day of the accident, and as a result this ditch became filled with light, soft snow. The plaintiff, who resided in another part of the county, and who had no knowledge of the existence of the ditch, arrived in Ironwood on the day previous to her injury, and upon the following morning, about 9:30 o'clock, while passing over the crosswalk, stepped into the ditch, the presence of which was entirely concealed by the light, soft snow, causing her to fall, with resulting injuries.

It is the contention of counsel for the plaintiff and appellant that the court erred in directing a verdict in favor of the defendant, for the following reasons, set forth in his brief:

(1) That the proximate cause of the injury was the dangerous condition in the street and crosswalk, resulting from the ditch constructed by defendant, into which the plaintiff stepped and was injured.

(2) That the fact that the ditch was concealed by a natural fall of snow which prevented plaintiff from discovering and avoiding it, in no way relieved the defendant from the result of its negligence in constructing the ditch, or permitting it to remain uncovered and unguarded, particularly in view of the fact that the

Digitized by Google

defendant admittedly knew and expected at the time that the ditch was dug that it would become filled and concealed by soft, light snow.

(3) That the ditch being constructed in such a manner and at such a time and place as to make it particularly dangerous, imposed upon the defendant the duty to cover, guard, or otherwise protect it.

(4) That the testimony on behalf of plaintiff at least raised a question for the jury as to whether or not the action of the city in constructing this ditch and allowing it to remain uncovered, unguarded, or otherwise protected, knowing and expecting that it would become filled and concealed by soft, light snow, left the crosswalk in a condition reasonably safe and fit for travel, and whether such unsafe condition of the crosswalk was the proximate cause of the injury.

The learned trial judge was of the opinion that the proximate cause of the accident was the natural accumulation of snow caused by the snowstorm, which had just ceased at the time the accident took place and had hidden the ditch; and that there was no evidence that the accident would ever have happened merely from the digging of the ditch. The question here involved is: Was the circuit judge right in holding that it can be said under these facts that the fall of snow was the proximate cause of the accident? If it can be so considered, he was fully justified in directing the verdict as he did.

The problem of determining the proximate cause, under the rules laid down by the various decisions, is indeed at times perplexing, and in the case of *Stoll* v. *Laubengayer*, 174 Mich 701 (140 N. W. 532), Mr. Justice BROOKE, in reviewing this subject, said:

"The definition favored by the compilers of 21 Am. & Eng. Enc. Law (2d Ed.), p. 485, is:

"'A proximate cause, in the law of negligence, is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred.'"

Digitized by Google

Can it be said that the snowstorm which filled the ditch was an independent unforeseen cause? That such falls of snow were anticipated is shown by the testimony of the street commissioner, who testified as follows:

"*Q.* Any ditch that you would dig, or the city of Ironwood would dig, for the purpose you have mentioned, or for any other purpose, along about that time of year, would in all probability become filled with snow, or a snowstorm might come and fill it up; might it not?

"*A.* Certainly.

"*Q.* You always had a crew of men on to go around and clean them out and open them up afterwards?

"*A.* Yes, sir.

"*Q.* You would expect that there would be light snow that would cover up those ditches?

"*A.* We always cleaned them out when it was possible. We always had men for that purpose. We would expect that there would be falls of snow that would cover up the ditches, and we would have to go and clean them out afterwards."

In the case of *Baker* v. *Railroad Co.*, 169 Mich. 609 (135 N. W. 937), this court said:

"To make such negligence the proximate cause of an injury, it must be the natural and probable consequence of the negligent act, which, under the circumstances, an ordinarily prudent person ought reasonably to have foreseen might probably occur as the result of his negligent act. Where an act is negligent, to render it the proximate cause, it is not necessary that the one committing it might have foreseen the particular consequence or injury, or the particular manner in which it occurred, if by the exercise of reasonable care it might have been anticipated that some injury might occur."

Viewing the testimony as to the construction of the ditch in the light most favorable to the plaintiff's claim, and taking into consideration the weather conditions prevalent in that part of the State at the time

Digitized by Google

of year the accident occurred, we are of the opinion that the fall of snow was not such an independent, unforeseen cause which intervened between the claimed negligent act of the city in constructing the ditch as it did and the time of the injury, that it can be said to be the proximate cause of the accident; and that the city should have anticipated the possibility of the fall of snow and that some injury might therefore result from having the ditch unprotected and uncovered. *Detzur* v. *Brewing Co.*, 119 Mich. 282 (77 N. W. 948, 44 L. R. A. 500); *Burrell* v. *City of Greenville*, 133 Mich. 235 (94 N. W. 732). The street commissioner testified that he had instructed his men to always dig ditches in the gutter, as that is the place where people might expect to find a ditch, and that he would not consider a ditch with perpendicular sides a proper ditch to put across a sidewalk.

Being satisfied that it must be said that the construction of the ditch was the proximate cause of the accident, we are of the opinion that the question of whether the action of the city in constructing and maintaining the ditch uncovered and unguarded, in the condition disclosed by the record, left the crosswalk in a condition reasonably safe and fit for travel, should have been submitted to the jury.

We are therefore constrained to reverse the judgment of the court below and grant a new trial.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

STORY & CLARK PIANO CO. *v.* HILDERINK.

1. TAXATION—INCREASE BY BOARD OF REVIEW—RECORD—CLERK—MEMORANDA.

   In making changes increasing the amount of property taxed, or assessed valuations, the board of review of a city, in the absence of the clerk, substantially complied with the requirements of the statute by directing one of the members to keep minutes, which he preserved in the form of rough memoranda, later filed with the clerk and prepared in typewritten form for permanent record in his office by the clerk (1 Comp. Laws, § 3323; 2 How. Stat. [2d Ed.] § 5853), where the memoranda, considered with the tax rolls, showed the changes so made, and where the amount of increase could be ascertained by computation, although the records did not show item by item the several amounts that the board added to or deducted from the valuations as fixed by the supervisors.

2. SAME—PREJUDICIAL ERRORS—STATUTES.

   No sufficient prejudice resulted to the taxpayer who ascertained the amount of increase and the fact of change from the rolls and memoranda kept by the board, and who was sufficiently informed to be able to file a protest; the tax being presumed to be valid under 1 Comp. Laws, § 3922 (1 How. Stat. [2d Ed.] § 1870), and unless the irregularity was of a jurisdictional nature the statute cured the defect.

3. SAME—ASSESSMENT—CITIES—MUNICIPAL CORPORATIONS.

   Only if the official action can be shown to have been fraudulent could the court hold the tax illegal, and the fraud must be clearly established. 3 Comp. Laws, § 3899.

4. SAME—INTENT—STATUTES.

   Evidence considered and *held* not to establish the claim that the assessors or board of review had omitted any property from the tax roll intentionally.

Appeal from Ottawa; Cross, J. Submitted October 8, 1915. (Docket No. 29.) Decided December 21, 1915.

Digitized by Google

Bill by the Story & Clark Piano Company against G. J. Hilderink, one of the supervisors of the county of Ottawa, for an injunction. From a decree for defendant, complainant appeals. Affirmed.

Lillie & Lillie, for complainant.

Louis H. Osterhous, for defendant.

STONE, J. In this case the bill of complaint was filed July 7, 1914, to obtain an injunction to restrain the defendant as the supervisor of the First ward of the city of Grand Haven, from spreading taxes upon the property of complainant on the valuations fixed by the board of review, or on a valuation in excess of that placed thereon by defendant as supervisor. The complainant is a foreign corporation engaged in the manufacture of pianos and player pianos in said city—the same being a city of the fourth class—and having a factory in the First ward thereof. Defendant was, in the year 1914, supervisor of that ward, and as such assessed the real estate of the complainant at $72,000, and its personal property at $59,000, when he made up his assessment roll in the month of April. The board of review of the city met on the second Monday of May and remained in session 24 days thereafter, reviewing the rolls, examining the property throughout the city, and revising the tax rolls as prepared by the supervisors. At its session of June 11, 1914, the board of review, among other actions, increased the assessed valuation of complainant's real estate to $100,000, and the assessed valuation of its personal property to $100,000. On June 12th, the complainant filed with the board its protest against such increases, which protest was considered by the board on June 13th, and rejected. This protest is set forth in full in the bill of complaint. Thereafter this bill was filed.

We shall consider the claims of complainant in the

Digitized by Google

order in which they were treated by the court below. There are three principal propositions:

(1) The claim that the board of review did not keep a suitable record of its proceedings, and that its action was therefore without jurisdiction and void.
(2) The claim that the valuations placed on the real estate and the personal property by the board of review are excessive.
(3) The claim that the supervisors and the board of review omitted from the tax rolls more than $100,000 in assessable property in the form of household goods, furniture, etc., thereby causing complainant to bear more than its just share of the burden of taxation.

There is in the bill of complaint no express charge that the board acted fraudulently or with any improper intention or purpose. The bill does claim, however, that the action of the board of review under the second and third headings constituted a fraud on complainant and wrongfully and fraudulently would compel complainant to pay more than its just share of taxes in the said city; and, generally, that the action of said board of review constituted a fraud in law against complainant, which, if not remedied, would compel complainant to pay more than its just share of the burden of taxation in said city. The case, being at issue, was heard, by the trial judge, upon the testimony taken in open court as in a suit at law. The hearing resulted in a decree dismissing the bill of complaint with costs to the defendant. The complainant has appealed.

The record is a voluminous one, for the reason that about 50 witnesses were sworn upon the question of the omission of personal property from the roll. We have read the record with care, and in disposing of the case shall not quote therefrom at any great length.

1. We will consider the claim that the board of review did not keep a sufficient and suitable record of its

Digitized by Google

proceedings. During the progress of the work of the board, one of its members, in the absence of the clerk, kept what might be termed rough minutes or memoranda of its proceedings. They were afterwards filed with the city clerk, and from them the clerk made up a permanent typewritten record to remain in his office, as testified to by him. It appears in evidence that on June 11th the board acted on the assessments of what are termed manufacturing properties of the city, including complainant's property. At that time the condition of the roll was as above stated in so far as it relates to complainant's property. On this day a motion was made to increase the real estate assessment to $100,000, and a further motion was made to increase the personal property assessment of the complainant to $100,000, also. The evidence shows that the roll was called by the chairman, and all the members of the board voted, "Yes." It further appears that, at the time, the supervisor of the First ward entered in his assessment roll, in the proper columns, the true cash value of the real estate as fixed by the board of review at $100,000, and the same amount as fixed by the board on the personal property. So far as it affected this property, the memorandum was as follows:

Story & Clark	
Real	$100,000
Personal	100,000
	$200,000

All yes on roll call.

This memorandum of the proceeding was filed with the clerk, as above stated, and from it he made the following permanent typewritten record:

"Moved and supported that Story & Clark Piano Company's personal assessment be placed at $100,000 and the real at $100,000. Total $200,000. Which motion was carried."

Digitized by Google

On June 11th, the attorney for complainant was notified of the board's action, appeared at the board meeting, examined the rolls, noted the action of the board in increasing the valuations of complainant's property, and announced that he would file a protest. On June 12th, the same attorney filed with the board a long protest in writing signed by complainant, and, as we have above stated, on June 13th, this protest was considered by the board and rejected.

Upon the foregoing facts, complainant insists that the action of the board of review in increasing the valuation of its property was without jurisdiction, and was void, because the record of its proceedings kept by such board did not comply with the statute.

Section 3323, 1 Comp. Laws (2 How. Stat. [2d Ed.] § 5853), relates to the assessment and collection of taxes in fourth-class cities. That section requires the board to keep a record of their proceedings and of changes made in such rolls, and provides that the amounts added to, or deducted from, the total valuation in each ward, shall be entered upon such record, which record shall be deposited with the city clerk, who shall be clerk of said board.

It is the claim of the defendant that the record kept by the board sufficiently meets the requirements of the statute referred to, and it is urged that the record consists, not only of the brief memorandum complained of, but also of the tax rolls, in which, as each assessment was considered and acted upon, a supervisor set down in the proper column the valuation agreed upon by the board of review. The completed rolls, with the changes made, were duly indorsed by the clerk, and the minutes or memoranda of the proceedings were afterwards filed with the city clerk, and from them the permanent typewritten record was afterwards made by the clerk for his files. It is true that these records do not show, item by item, the several amounts

Digitized by Google

added to or deducted from the supervisors' valuations; but these amounts can be ascertained by computation, and in our opinion this makes a sufficient record, and is a substantial compliance with the statute. *Auditor General* v. *Ayer*, 109 Mich. 694 (67 N. W. 985); *Auditor General* v. *Sparrow*, 116 Mich. 574 (74 N. W. 881); *Auditor General* v. *Ayer*, 122 Mich. 136 (80 N. W. 997).

The real purpose of the law requiring the keeping of a record is, of course, to enable interested taxpayers, by an examination thereof, to learn what the board of review has done. Certainly, under the evidence in this case, this record was sufficient to inform the attorney for complainant of what had been done, because we find him promptly filing a protest against the action of the board. Under the statute referred to, when reviewed and certified to, as the roll in question was, it must be conclusively presumed by all courts and tribunals to be valid, and cannot be set aside except for causes mentioned in the general tax law of the State (section 3899, 1 Comp. Laws) relative to the assessment of property and the levy and collection of taxes thereon; and failure of the board of review to keep a record of its proceedings is not one of the causes mentioned in the statute.

Another reason is that, by statute (section 3922, 1 Comp. Laws [1 How. Stat. (2d Ed.) § 1870]) it is provided that no tax assessed upon any property shall be held invalid by any court on account of any irregularity in any assessment, or on account of any other irregularity, informality, or omission, or want of any matter of form or substance in any proceeding, that does not prejudice the property rights of the person whose property is taxed.

This is a curative statute, and, while it cannot cure want of jurisdiction, yet irregularities and omissions which are not jurisdictional, and do not prejudice the

Digitized by Google

property owner, will not void the tax. In our opinion the above statute applies to the failure of the board of review to keep a record of its proceedings. *Auditor General* v. *Iron Co.*, 132 Mich. 454 (93 N. W. 1080). In that case the single question was presented whether failure of the board of review to keep a record of its proceedings rendered the tax spread upon the roll invalid as against one who had suffered no injury by reason of such omission, and it was held that it did not. It is true that in that case the taxpayer's property was reduced in value by the board of review, but the point decided was that failure to keep a record would not invalidate the tax where the taxpayer was not injured or prejudiced by the omission to keep such a record; and we think, under the evidence in this case, the complainant was not injured or prejudiced by such claimed omission. Upon this branch of the case the trial court, in its findings, said:

"The proofs show that the board of review kept a record of its proceedings, but it is the claim of the complainant that the record is insufficient to show what action was taken by the board of review. After the board of review raised the valuation of the property of the complainant, the complainant was notified of its action, and complainant filed a protest with the board of review. The protest is set forth in paragraph 6 of the bill of complaint, and fully sets forth the action of the board of review in so far as the proceedings affected the property of the complainant. The protest clearly shows that the complainant had full and complete knowledge of the action of the board of review, and complainant cannot now complain that the record was insufficient to give complainant the desired information."

We agree with the conclusion reached by the trial judge upon this branch of the case.

2. We will next consider the claim that the valuations placed upon both real estate and personal prop-

Digitized by Google

erty by the board of review were excessive. This claim was made by the protest filed. It is worthy of suggestion that, upon the trial of this case, none of the officers or employees of the complainant was produced and sworn as a witness. Neither did the officers present before the board of review, although requested to do so, their inventory and appraisal of the property, both real and personal, or their insurance policies.

It is urged strenuously by counsel for the complainant, in their brief, that the members of the board of review acted, not only carelessly but recklessly, and that such board exercised no proper judgment and followed no proper method in arriving at the valuation of complainant's property. As we have said, nowhere have they charged fraud or discrimination, or an intentional overvaluation by the members of the board of review.

We have examined with great care the testimony on this branch of the case, and we fail to find any evidence that weakens the testimony of the members of the board, who were sworn, that they exercised their best judgment as to the value of the real estate. And, as to the personal property, there had been a showing that the inventory value of complainant's personal property on January 1, 1914, was $143,000; that this personal property had been reduced $40,000 since the first of the year; leaving a balance on hand in April, 1914, of $103,000. It is true that complainant asked that this be reduced, but in our judgment it failed to produce any adequate evidence to warrant such reduction, and there is nothing in the record to show that the board of review did not act in the utmost good faith in making the assessment of both real estate and personal property. The property of complainant was not the only property the valuation of which was increased. Its assessed value was increased 53 per cent. Nine or ten other manufacturing properties were in-

Digitized by Google

creased above the assessed valuations, ranging from 24 per cent. to 265 per cent. The statute provides that the valuation fixed by the board of review must be conclusively held by the courts and tribunals to be valid, unless it is proved that the board acted without jurisdiction, or fraudulently. Section 3899, *supra.*

This court has held that, before a court is justified in holding a tax to be illegal because the supervisor or the board of review acted fraudulently, that fact should be clearly shown by the evidence. *Williams* v. *City of Saginaw,* 51 Mich. 120 (16 N. W. 260); *Peninsula Iron, etc., Co.* v. *Township of Crystal Falls,* 60 Mich. 510 (27 N. W. 666); *Brown* v. *City of Grand Rapids,* 83 Mich. 101 (47 N. W. 117); *Pioneer Iron Co.* v. *City of Negaunee,* 116 Mich. 430 (74 N. W. 700); *Aurora Iron, etc., Co.* v. *City of Ironwood,* 119 Mich. 325 (78 N. W. 126); *Power* v. *City of Detroit,* 139 Mich. 30 (102 N. W. 288, 5 Am. & Eng. Ann. Cas. 645); *Island Mill Lumber Co.* v. *City of Alpena,* 176 Mich. 575 (142 N. W. 770).

We think the trial court was justified in its finding upon this branch of the case wherein it said:

"The bill of complaint does not allege that the board of review acted fraudulently, from improper motives, or that the valuations were purposely made too high through prejudice, or a reckless disregard of duty. The proofs show that the board of review acted fairly, honestly, and in good faith, and that their only purpose was to fully perform the trust that had been conferred upon them as public officials, that they honestly believed that the property was really worth what it was assessed by them, and that they acted in good faith, in the exercise of their best judgment, in fixing the valuations."

3. This brings us to consider the claim that the supervisors and the board of review omitted from the tax rolls more than $100,000 of assessable property in the form of household goods, furniture, etc., thereby causing complainant to bear more than its just share

Digitized by Google

and burden of taxation. In support of its claim the complainant called the four supervisors of the city. We have examined their testimony with care and are impressed with the candor of it. Complainant then called about 50 witnesses, residents of the city, and we have laboriously gone through their testimony. Counsel for appellant have, in their brief, tabulated this testimony; but we are not satisfied with the conclusion there reached. We think the conclusion is not warranted by the testimony of the witnesses. Many of them testified to insurance upon their personal property, household furniture, etc., in larger sums than the value would warrant. In many instances the witnesses testified that their household goods and effects had been in use for many years, and while the insurance was in excess of $500, the exempted amount, yet they testified that in all probability their household goods and effects would not sell for more than $500. In some instances the witnesses had been requested to make statements, and had made statements of their taxable property, omitting household furniture and effects. Two of the supervisors testified that the residents of their wards were laboring people, and they did not believe that they had household goods of a value in excess of $500. That the testimony of these witnesses does not warrant the claim put forth for it, by appellant's counsel, is evident from the cross-examination of one of them, wherein the following occurred:

"*Q.* Are the witnesses in this case, Mr. Lillie, that you have subpœnaed and produced, practically all of the residents of this city whom you think might have taxable property?

"*A.* No, not a quarter of them; and, if the balance of them would come in and swear as some of them have here, I think there would be too many donations that would be required to be taken up, to have them have something in their home to use.

"*Q.* The witnesses whom you have subpœnaed are

Digitized by Google

some of the leading citizens and leading business men of the city?

"*A.* Yes, sir.

"*Q.* You selected them as at least fair samples, or fair representatives, of the better or higher class of householders in the city?

"*A.* I selected them because I believed that they would have more than some other people here that I knew. Some of them, of course, I was mistaken in; some of the wealthy class haven't got as much as some of the poor men sworn here."

We can only consider the testimony as it stands, whether disappointing to counsel or not.

We are not satisfied that any considerable amount of property liable to taxation was omitted from the rolls in the city of Grand Haven, and we say this after carefully reading the entire testimony. We have looked in vain in this record for any claim made by complainant, or its attorney, before the board, of undervaluations, or any failure to place on the rolls assessable property of any kind. The protest filed in no manner refers to the subject.

This court held, in *Fletcher Paper Co.* v. *City of Alpena,* 172 Mich. 35 (137 N. W. 640), that before resorting to either recover taxes paid, or to avoid taxes on the theory that the property of another had been undervalued or omitted from the rolls, the taxpayer must appear before the board of review and complain that other property was assessed too low, or omitted entirely. We think a complete answer to complainant's claim upon this branch of the case is that it has wholly failed to prove even an inadvertent, unintentional omission from the tax rolls of household goods, furniture, etc., liable to assessment, in any appreciable amount at least, and we are constrained to hold that there is no evidence that any supervisor or member of the board of review intentionally or fraudulently, or intending or desiring to discriminate in any way,

Digitized by Google

omitted from the tax rolls any taxable property; and all of these things complainant is bound to prove before it is entitled to relief.

There is a class of cases in this State where relief has been granted. They are cases in which the taxpayer was held justly to complain; where there was a studied effort or combination on the part of the assessing officers to shift taxation from one class to another, or where the officers designedly discriminated against certain property owners in favor of others, or where large amounts and values of property were designedly left off the rolls. Some of these cases are the following: *Merrill* v. *Humphrey*, 24 Mich. 170; *Walsh* v. *King*, 74 Mich. 350 (41 N. W. 1080); *Solomon* v. *Township of Oscoda*, 77 Mich. 365 (43 N. W. 990); *Auditor General* v. *Jenkinson*, 90 Mich. 523 (51 N. W. 643); *Auditor General* v. *Prescott*, 94 Mich. 190 (53 N. W. 1058); *Auditor General* v. *Iron Co.*, 123 Mich. 521 (82 N. W. 260); *Fletcher Paper Co.* v. *City of Alpena*, 160 Mich. 462 (125 N. W. 405).

Upon the other hand, this court held, in *City of Muskegon* v. *Boyce*, 123 Mich. 535 (82 N. W. 264), that the mere fact that some of the property upon an assessment roll was undervalued, or that taxable property was omitted from the roll, was insufficient to invalidate an assessment; but to have that effect it must also be made to appear that such action on the part of the assessing officer was intentional, and that the person complaining was thereby compelled to pay more than his just proportion of taxes. Neither of these two essential elements was proved to be present in the instant case.

We think the court below reached the correct conclusion wherein it said:

"The proofs fail to show that personal property was intentionally left off from the assessment roll by the board of review. An examination of the testimony in

Digitized by Google

the case will convince any one that men differ in judgment as to the value of household goods, but the testimony fails to show that the board of review acted fraudulently or with any design or intention to omit any personal property from the assessment roll. They acted fairly, and exercised their best judgment, and attempted to fully perform their duties, and the complainant has failed to make out a case for relief."

The decree below is affirmed, with costs to the defendant.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

ELSEY v. J. L. HUDSON CO.

1. NEGLIGENCE—LICENSEE—EVIDENCE—ELEVATORS.

Evidence that plaintiff, who was lawfully in the store of defendant, entered its elevator to be carried up, when it dropped about four feet, causing a passenger on the point of entering to fall against and injure plaintiff, who was unable to produce any testimony to establish the cause of the accident except proof of a statement by defendant that the car fell because some one jostled the arm of the operator, and made the machine descend, was not sufficient proof of a negligent cause to require the court to take the verdict of the jury.[1]

2. SAME—RES IPSA LOQUITUR—PRESUMPTIONS.

No presumption of negligence arose by reason of the mere falling of the elevator; proof of negligent conduct of the proprietor was necessary to raise an issue for the jury.[2]

---

[1] On liability for injury to elevator passenger see notes in 25 L. R. A. 33, 2 L. R. A. (N. S.) 744, L. R. A. 1915E, 722.

As to presumption of negligence from injury to passenger on elevator, see notes in 13 L. R. A. (N. S.) 619, 29 L. R. A. (N. S.) 816.

[2] On storekeeper's liability to customer for injury by defective elevator, see note in 21 L. R. A. (N. S.) 461.

Digitized by Google

Error to Wayne; Shepherd, J., presiding. Submitted October 6, 1915. (Docket No. 16.) Decided December 21, 1915.

Case by Elizabeth E. Elsey against the J. L. Hudson Company for personal injuries. Judgment for defendant. Plaintiff brings error. Affirmed.

Thomas A. E. Weadock, for appellant.

Douglas, Eaman & Barbour, for appellee.

STONE, J. This is an action on the case for damages occasioned by the alleged negligent drop of an elevator in the store of defendant, causing injury to the plaintiff. On Saturday, November 30, 1912, the plaintiff, while upon a shopping tour, entered the defendant's elevator on the main or ground floor of the defendant's store in the city of Detroit. She desired to go up. The elevator had come from the basement, was even with the store floor, and the conductor or operator announced that it was going up. This elevator was of the Otis plunger type, operated by hydraulic power. It was capable of carrying 30 persons comfortably, and at the time of the accident there were 10 or more people in the car. The plaintiff had been a frequent customer at the store, and she entered the elevator without mishap and was awaiting the lifting of the elevator. While the elevator conductor stood in his proper place, holding the controller as usual, the elevator dropped about four feet. The drop of the elevator caused a large woman, who was entering at that instant, to fall and strike the plaintiff on the head, resulting in the injuries complained of.

There were two counts in the declaration. In the first count, after stating the duty of the defendant, it was alleged that:

Digitized by Google

It "did not use due and proper care to provide and maintain reasonably safe and suitable machinery, wires, cables, ropes, pulleys, and other appliances for the operation of said elevator, as aforesaid; that is to say, the ropes, cables, and pulleys then used by said defendant in the operation of said elevator were old, worn out, and rotten, and were wholly unsafe, unfit, and unsuitable for the operation of said elevator, and the operator in charge thereof was an incompetent boy."

In the second count, after alleging the duty of the defendant, the following allegation appears:

"Yet the said defendant, disregarding its said duties, did not maintain said elevator in a reasonably safe condition for use, and did not employ a competent operator, and did overcrowd and overload the same, and did not have the machinery, levers, brakes, safety catches, and other machinery and appliances connected with said elevator and a part thereof in a reasonably safe condition, and did not properly care for passengers in said elevator, nor guard them from danger, and did not have a competent person in charge of said elevator to start and stop the same, so that passengers might be safely carried therein, and safely enter and leave the same, nor did it have a competent superintendent, or starter, to regulate the proper number of passengers allowed to enter said elevator at any one time, and especially at the time said plaintiff was a passenger therein, and did not have said elevator suitably, and frequently inspected by competent inspectors, and did not have the same inspected by the superintendent of public buildings of Detroit, and did not report to said department a full account and description of said elevator and the date of its installation within 90 days after July 12, 1912, and did not have said elevator equipped with proper brakes and safety catches, nor did it immediately report said accident of November 30, 1912, to said department of public buildings, nor did it ever make the full report required by"

—an ordinance of said city approved June 12, 1912. It was further alleged that the plaintiff's injury could

Digitized by Google

only have been caused by the failure and negligence of said defendant to have a proper elevator in reasonably safe condition, run by a competent operator, and that the occurrence of said accident, in and of itself, showed defendant's negligence.

At the close of plaintiff's case, the trial court, on motion of the defendant, directed the jury to return a verdict for the defendant, upon the ground that there was no evidence of any negligence of the defendant, and that the plaintiff had not presented such a case as entitled her to a verdict. A verdict and judgment for the defendant followed.

There was a motion for a new trial upon the following grounds:

(1) Because the court erred in directing a verdict for the defendant.

(2) Because the court erred in following a rule of decision in this State, that negligence could not be presumed from the happening of an accident, instead of following the exception to that rule, that in a case like this negligence might be presumed from the happening of the accident, and it was not the duty of the plaintiff to point out exactly how the accident occurred.

(3) Because the court erred in refusing a continuance of the case from November 19th in the afternoon to November 20th in the morning, in order to obtain the testimony of the defendant's servant who operated the elevator at the time of the accident.

(4) Because it was a question of fact for the jury whether defendant was guilty of negligence.

After a careful reading of all of the evidence in the case, we are constrained to hold that no cause was shown why the elevator dropped. All of the witnesses to the accident, who testified, stated that they did not know what caused the elevator to descend. The plaintiff's daughter, who was present, testified that the conductor did not start it. There was no evidence tending to show a probable reason for the falling of the elevator. The man who acted as the starter of the eleva-

Digitized by Google

tor, and who was directly in front of and in charge of the elevator, testified that such a drop might be caused by the breaking of the pin of the neutral control, or by the absence of a spring, or by lowering of the water pressure. He further testified that the elevator conductor was at his proper place and was attentive. He testified:

"I saw the elevator drop, but I don't know why it dropped. The man was there at his work. Every Friday we have the elevators inspected."

From aught that appears from the evidence, the elevator was in first-class condition, and there was no evidence that there had been any previous trouble with it. There was no evidence tending to show that the conductor or operator was incompetent, or that proper care and the usual precautions were wanting.

Against the objection of defendant, a copy of a report made by the defendant to the office of the inspector of buildings of the city of Detroit was put in evidence. This report stated:

"Some one jostled the arm of the elevator conductor, in which he held the lever of the car. This caused the lever to shove over, so that the car descended."

Upon the hearing of the motion for a new trial the plaintiff was permitted to place upon the stand, and examine orally, the elevator conductor. In his reasons for denying the motion the learned trial judge referred to such testimony. He said:

"There was no showing of what caused the elevator to drop, at the trial, except a statement made by the J. L. Hudson Company to the elevator inspector. On the motion for a new trial, the conductor of the elevator was sworn and examined by the attorney for the plaintiff, and explained that the dropping of the elevator was due to the fact that one of the passengers struck his shoulder, causing him to fall back far enough to move the lever, which let the car drop a short distance,

Digitized by Google

and that he immediately brought the car back to place.

"A verdict was directed for the defendant at the close of the plaintiff's case, for the reason that in the opinion of the court no evidence of negligence on the part of the defendant was produced; it being the opinion of the court that in this State it is necessary for the plaintiff to show something more than the mere happening of the accident.

"A motion for a new trial was filed, and the court allowed the testimony of the elevator conductor to complete the record, at the request of the attorney for the plaintiff. No new authorities were cited in arguing the motion for a new trial, and the parol testimony did not in any way tend to establish negligence, or raise any issues of fact for a jury. On the contrary, it tended to show that the injury resulted from the accidental jostling of the conductor's arm by a passenger of the elevator, so that the record, as it stands today, is absolutely free from any evidence of negligence on the part of the defendant. Attorney for plaintiff claims that a new trial should be granted for the reason that the elevator was overcrowded, but the testimony of the plaintiff and her daughter both controvert this position, as well as the testimony of the elevator conductor, who stated that there was room for four or five more passengers in the car.

"There is no evidence before the court of any defective, broken, old, or worn machinery, and there is no evidence that the elevators were out of order and not properly inspected; and, further, there is no evidence that ordinary care was not used by the defendant in this instance in the running of its elevators, and under the decisions in this State, especially the case of *Burgess* v. *Stowe*, 134 Mich. 204 (96 N. W. 29), it is expressly held that the owner of an elevator is only required to use the care of an ordinarily prudent person under the circumstances.

"Taking the testimony of the plaintiff in the case, and giving it the most favorable consideration, it shows that the elevator dropped three or four feet without any reason apparent to the plaintiff. Suppose the case had stopped here, and there had been no explanation as to why the elevator dropped. It seems to the court that under the decisions in this State it would be nec-

Digitized by Google

essary for the court to direct a verdict as it did, and the court has been offered no reason to overcome this belief which would warrant the granting of a new trial.

"In the case of *Hall* v. *Murdock*, 114 Mich. 223 (72 N. W. 150), the court says:

"'We think there was evidence sufficient to submit the case to the jury whether the cable had become old and worn, and parted in consequence. The mere fact that it broke, under the decisions of this court, was no evidence of negligence.'

"In the case of *Mirabile* v. *Simon J. Murphy Co.*, 169 Mich. 522 (135 N. W. 299), the Supreme Court of this State has passed on the question squarely. The plaintiff in that case proceeded on the theory that it was only necessary to show that the elevator dropped. He said:

"'When the plaintiff proved that the elevator dropped while she was alighting therefrom, her negligence in no way contributing thereto, she made out a *prima facie* case, establishing the negligence of the appellant.'

"The court, however, did not take this view, and Justice BLAIR said:

"'The weight of authority seems to be in favor of this proposition, * * * but such is not the rule in this State.'

—citing a number of cases sustaining this view."

The motion being denied, exception was duly taken, and the plaintiff has brought the case here for review, assigning many errors.

In his brief counsel for appellant says:

"Plaintiff was entirely blameless. She was in the elevator at the invitation of the defendant, and the accident could not have happened, unless it was guilty of negligence. The assignments of error have been referred to in the statement, showing how the questions arose. The last two assignments of error, however, viz., the direction of a verdict for defendant, and a refusal to grant a new trial, cover the case."

It is urged by appellant's counsel that the trial court erred in its construction of the *Murphy Case*, and he

Digitized by Google

places much stress on the language of Justice BLAIR, where he said:

"Where, however, the facts and circumstances surrounding an injury are such as to justify an inference of negligence, no further proof of negligence is required."

We find nothing in the facts of the instant case making applicable the language here quoted. We find nothing to justify an inference of negligence. We think that the reasoning of the trial judge, above quoted, fully justified him in denying the motion for a new trial, and in directing a verdict.

The rule is well settled in this State that the mere fact that an accident happens, is no evidence of negligence. We cite the following cases: *Toomey* v. *Iron & Steel Works*, 89 Mich. 249 (50 N. W. 850); *Robinson* v. *Wright & Co.*, 94 Mich. 283 (53 N. W. 938); *Peppett* v. *Railroad Co.*, 119 Mich. 640 (78 N. W. 900); *Whitcomb* v. *Railway*, 125 Mich. 572 (84 N. W. 1072); *Casterton* v. *Blower Co.*, 142 Mich. 407 (106 N. W. 61); *Brown* v. *Bryant*, 166 Mich. 180-183 (131 N. W. 577); *Fifelski* v. *Gas Light Co.*, 181 Mich. 503 (148 N. W. 195). We are of opinion that it cannot be held that the pushing or jostling of the conductor by a third person constituted negligence either of the conductor or the defendant. In the *Robinson Case* it was held that even the sudden breaking or giving way of a piece of machinery, properly constructed, was not sufficient to justify the conclusion of negligence. The rule which this court has applied is a reasonable one. In the *Casterton Case* it was said:

"We have many cases which hold that where a machine has worked well up to the time of the accident, and the occasion is unexpected and unexplained, a charge of negligence is not sustained. These cases are not necessarily applicable to a case where the machine has previously shown symptoms of inefficiency or dan-

Digitized by Google

gerous irregularity in its operation, for with such warnings it may be the duty of the proprietor to ascertain and remedy the tendency."

We have examined the numerous Michigan cases cited by appellant's counsel in support of his contention. In many of them, like *La Fernier* v. *Lighter & Wrecking Co.*, 129 Mich. 596 (89 N. W. 353), and *Lincoln* v. *Railway Co.*, 179 Mich. 189 (146 N. W. 405, 51 L. R. A. [N. S.] 710), there was evidence tending to show negligence, and we held that, although negligence will not be presumed from the mere fact of an accident, yet such fact may be taken into consideration, in connection with all the other facts and circumstances, in determining whether negligence existed. In another class of cases like *Barnowsky* v. *Helson*, 89 Mich. 523 (50 N. W. 989, 15 L. R. A. 33), it has been held that negligence might be inferred from the circumstances. In the case of the falling roof there was also evidence that it was not properly braced, and the facts were so simple that a majority of the court held that the presumption was almost conclusive that the roof fell because it was not sufficiently braced or stayed. These cases are readily distinguished from the instant case.

We deem it unnecessary to discuss the other assignments of error, for the reason that the verdict rendered was the only one that can be justified.

The judgment of the circuit court is affirmed.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

GUNGRICH *v.* ANDERSON.

1. EVIDENCE—PREJUDICIAL ERROR—CHILDREN—APPEAL AND ERROR.
   Though testimony of plaintiff in an action for assault and battery against her employer that she had several children, giving their respective ages, was improper, and ought to have been excluded by the trial court, a ruling admitting the evidence was not prejudicial where it had already appeared that plaintiff had a child, and that the alleged quarrel arose over her request to leave her employment and visit the infant.

2. SAME—CONCLUSION—TRESPASS VI ET ARMIS.
   On an objection of the defendant that plaintiff was testifying to a conclusion, the court did not err in admitting plaintiff's statement that she declined to work for a week following the assault and that it was because of the injury she had received in the assault.

3. TRIAL—APPEAL AND ERROR—ARGUMENT—MISCONDUCT OF COUNSEL—SAVING QUESTIONS FOR REVIEW.
   It was erroneous for plaintiff's attorney to invite the jury to give her what they would consider a mother or sister of their own would be entitled to receive, under like circumstances, but in the absence of a ruling of the court and exception to it, there was no question for the Supreme Court.

4. TRESPASS—ASSAULT AND BATTERY—VI ET ARMIS.
   Where plaintiff, who was a domestic servant of defendant, asked for a few days off to enable her to visit her child in a neighboring town, and defendant refused the request, over which an altercation ensued, and plaintiff claimed to have been severely injured, the rules applicable to a trespasser were not in effect as to plaintiff's right to remain; she had the right to a reasonable time to collect her belongings and make ready for departure.

5. SAME—REASONABLE FORCE—OPPORTUNITY TO DEPART—MASTER AND SERVANT.
   The defendant was not entitled to use force to expel the servant, as in case of an intruder, or to force her to de-

Digitized by Google

part without reasonable notice to enable her to leave peaceably.

6. SAME—DAMAGES—CHARGE—TRIAL—PROVOCATION.
The charge of the court that defendant would not be justified in assaulting plaintiff, if the latter called her a liar, but that the evidence went to the amount of damages, was not error, but correctly stated the law.

7. SAME—NEW TRIAL—VERDICT.
Held, also, that a verdict of $250, reduced by the trial court to $150, was not so excessive, as modified, that the appellate court should award a new trial.

Error to Muskegon; Sullivan, J. Submitted October 12, 1915. (Docket No. 33.) Decided December 21, 1915.

Case by Emily F. Gungrich against Mary E. Anderson for assault and battery. Judgment for plaintiff. Defendant brings error. Affirmed.

Turner & Turner, for appellant.

Cross, Vanderwerp, Foote & Ross, for appellee.

STONE, J. This is an action on the case to recover damages for an assault and battery alleged to have been committed by the defendant upon the plaintiff on the evening of the 9th day of April, 1914, at the village of Montague, and for the resulting injuries. The declaration charges a violent assault upon the person of the plaintiff, and that defendant with great force and violence pulled and dragged plaintiff about and struck her a great many blows with her fist, and threw plaintiff against the wall of the room where said assault took place, and also threw the plaintiff upon the floor, striking and pinching the plaintiff, pulling her hair, and tearing off her dress, by means whereof the plaintiff then and there became and was greatly hurt, cut, bruised, and wounded in and about her face, head,

Digitized by Google

arms, and back, and so continued for the space of four weeks; that plaintiff suffered great bodily pain and mental distress, and was obliged to undergo medical treatment, and was hindered and prevented from performing and transacting her lawful and customary occupation of doing housework, whereby she lost great gains, etc., and she also averred that she was, by said assault, permanently injured in and about her head, back, and spine, and was unable to do her accustomed work, etc. The plea was the general issue.

It appeared upon the trial that the plaintiff was a married woman, upwards of 50 years of age, and was, at the time of the alleged assault, employed by the defendant as a domestic in the home of the latter. There was a sharp conflict in the testimony as to who was the aggressor, and as to the nature and extent of the assault.

The plaintiff, in substance, testified that on the occasion of the assault a neighboring woman came to the house and into the room where the parties were, and invited the plaintiff to go with her to Grand Rapids on the following Sunday, where the plaintiff might visit her child; that plaintiff turned to defendant and asked permission to go; that defendant refused to let plaintiff go, whereupon a somewhat heated discussion and controversy arose between the parties, wherein defendant said to plaintiff: "No; you can't go. You are out every night, all night"—which statement was denied by plaintiff. Plaintiff further testified:

"Well, she said I couldn't go. I said: 'All right; there is something else that I would like to talk to you about; it is about the dollar that the man gave me. You say that this man is supplying me with money because he left a dollar for my little girl.' She [defendant] said: 'Now, then, you get out of here;' she said, 'You get right out of here,' and she opened the door, and when she told me to get out, I started to take my apron off to go. I turned into my bedroom to take

Digitized by Google

my dress off, and I said, 'I will go when I get ready,' and I went in to get ready, and before I knew it, without a moment's warning, she was on my back, and she grabbed me by the back and dragged me to the door that she had opened, that led into the buggy shed, and instead of throwing me out, as she said she would throw me out, she throws me on the couch that was there by the door, and I was so surprised I had nothing to say, never said a word to her. I got up, and when I got up, instead of throwing me out as she wanted to do—I didn't notice whether the door was opened or closed then—but she took me once more. While I was down she dug her fingers into my arms, just like that (illustrating). She didn't slap me, but got her main hold with her fingers in that way, and then when I got up from that position, she then took me again, the second attack, and threw me across the room near my bedroom door, and under a little table that was there. I said, 'That must be a pleasure to you Mrs. Anderson.' She grabbed me again, then got me up to the wall with my back, and went like this (illustrating), as hard as she could, and I stood there by the door, and I noticed that my dress was torn, and I went into the bedroom and I stood by the bed to take my dress off, and in taking off the dress I made this remark: 'Well, it is a shame to have to be used like this.' And then it was so late at night, my own house was closed up for the winter, and I didn't know what to do, I said, 'Isn't it terrible,' out loud, 'to be used like this.' She made one spring from the stove, where she was, onto me, and fought for the dress, and I fought with her, but I wasn't nothing in her hands. She got the dress and took it, opened the stove door and threw it in, like that (illustrating). She said, 'There you old bitch you.' * * * And I went into my bedroom again, and when she got into the bedroom she went into my hair. This was during the time that this dress affair was going on. She came back and threw me backwards onto the bed, and there is where the fight, the real fight was then."

The plaintiff then described how her hair was pulled by the defendant. The above is only a part of plaintiff's testimony relating to the assault.

Digitized by Google

Defendant offered testimony tending to show that plaintiff was the aggressor, and that defendant only acted in self-defense. The case was submitted to a jury, and the plaintiff recovered a verdict and judgment for $250. The defendant moved for a new trial upon the following grounds:

(1) That the verdict was contrary to the great weight of the evidence.
(2) That the verdict was grossly excessive in amount.
(3) Because the jury were allowed to aggravate actual damages, when there was no claim in the declaration that an assault and battery was perpetrated without cause, provocation, or excuse, and no allegation of a wilful or wanton assault.
(4) Because the charge of the court did not correctly set forth the law as applicable to the facts developed upon the trial of the case.
(5) Because the charge ignored the claim of defendant as to what occurred immediately preceding the touching of plaintiff's person by the defendant.
(6) That under the pleadings and the claim of the parties upon the trial, the jury should have been instructed that if they found that defendant was only asserting what she claimed to be her legal rights, and did not act oppressively, wantonly, or maliciously, then the only damages they could assess would be what plaintiff had actually sustained.
(7) Because in the charge the law regarding the rights of the parties in the home of defendant was not correctly set forth, in that the jury should have been instructed that if the plaintiff refused to leave the house upon defendant's request, then the defendant had a right to use such force as was necessary to eject her therefrom.

The trial judge in disposing of the motion for a new trial, held that the verdict and judgment were excessive, and directed that unless the plaintiff remitted $100 of the judgment, a new trial should be granted. Thereupon the plaintiff remitted that sum, leaving the judgment to stand for the sum of $150, and the mo-

Digitized by Google

tion was denied and exception duly entered. The defendant has brought the case here for review, and there are 17 assignments of error.

The first 3 assignments of error relate to that part of the testimony of the plaintiff wherein she was permitted to testify about her children, and what her family consisted of, the number and age of the children, etc. That she had a child in Grand Rapids that she wanted to visit, appeared in her testimony relating to the assault. We are unable to see any relevancy, however, to the remainder of her testimony, upon the subject of her children, or family. We do not think, however, that the ruling admitting this testimony was so prejudicial as to justify a reversal. It probably could have no bearing, except upon the measure of damages, and as the trial judge considered that subject upon the motion for a new trial, and the judgment has been reduced in amount, we cannot say that the error here complained of resulted in a miscarriage of justice.

By the fourth assignment of error the following testimony of the plaintiff is complained of:

"I refused to work the first week after this happened. I was too sore, no strength, my mind was—I couldn't work.

"*Q.* Whether or not this was due to this injury you received at the hands of Mrs. Anderson?

"*A.* Yes, sir."

This testimony was objected to as being a conclusion. The objection was overruled, and an exception taken. We think that the witness was testifying to a matter of fact, and that there was no error in the ruling. *Dyer v. Ice Co.*, 188 Mich. 203 (154 N. W. 135).

By the fifth assignment the following language of one of plaintiff's counsel in his argument to the jury is complained of:

"Give her [plaintiff] what you would want your mother or sister to have under like circumstances."

Digitized by Google

That this language was improper we have often held. From an examination of the record, however, it does not appear that the attention of the court was called to this matter, nor was any ruling asked for, but defendant's counsel simply excepted. We have repeatedly held that unless a ruling is requested of, or made by the court, an assignment of error, based upon an exception to improper argument, will not be received. *Spencer* v. *Johnson,* 185 Mich. 85 (151 N. W. 684), and cases there cited.

The remainder of the assignments of error relate to the charge of the court, and the overruling of the motion for a new trial. In the course of a lengthy charge the trial court said:

"But whether Mrs. Gungrich called Mrs. Anderson a liar or not, Mrs. Anderson for that had no right to seize Mrs. Gungrich by the arms to put her violently out of the house, and if she did seize Mrs. Gungrich by the arms to put her violently out of the house, before Mrs. Gungrich had a reasonable and proper time to go to her room and pack up her clothes, Mrs. Anderson would be guilty of an assault and battery, and Mrs. Gungrich is entitled to recover some compensation for the injury that was done her. There is where this matters turns upon.

"If without giving her time, she took her by the arm and forced her up to the door, and opened the door to go out, Mrs. Gungrich had a right to resist that also, and to refuse to go, because she did not have her proper time. The rights are relative in that matter.

"She had a right to go to her room, and the word 'liar' would not justify Mrs. Anderson in putting her out immediately upon that occasion. Now that is the law of this State.

"Now, take it from me. Don't say that, 'I would have done the same thing myself,' because that isn't the law. The law is to be taken by the jury, from the court, and when any person unlawfully lays hands upon one, the person that is assaulted has a right to resist.

Digitized by Google

"Now, what took place there after that? It was all in connection with whatever did happen there. This waving of a dress, saying that was evidence, and all that kind of thing—neither would that justify an assault, and neither, then, because of that waving of the dress, would Mrs. Anderson have a right to clutch it from her, to pull it away. She would have no right to do that."

The above portion of the charge, paragraph by paragraph, was covered by the assignments of error. It should be remembered that the plaintiff was a domestic servant of the defendant, and as such servant was a member of the household. The rule applicable to a trespasser did not apply. Plaintiff had a right to be there until she was discharged, and when discharged she was entitled to a reasonable time and opportunity to gather her belongings together, and prepare for removal. This trouble occurred in the evening, which was a circumstance to be considered in determining whether the plaintiff was required to immediately leave the house, where she had a right to be until discharged. In our opinion the court did not err in its statement of the law applicable to the case. We think the defendant was not justified in using force to eject the plaintiff from the house until she had been given a reasonable time in which to leave. The rule laid down by the Iowa supreme court in *Redfield* v. *Redfield*, 75 Iowa, 435 (39 N. W. 688), is the correct one. Defendant had no right to attempt to eject plaintiff by force, without reasonable notice to the latter to enable her to go peacefully.

We have examined the remaining portion of the charge. Attention was called to the issue wherein it was claimed by defendant that plaintiff called her a liar. The court said:

"I said that would not justify an assault, yet still that is a proper thing for you to take into consideration as to damages. That is for you to weigh and con-

Digitized by Google

sider as an element going to fix the amount of damages. If she didn't call her a liar, that is a matter also for you to take into consideration as fixing the amount of damages, because where a person invites an assault by words, though no words will justify an assault, yet, still, they ought not to recover the same damages, as where the assault is unprovoked, without good cause or reason."

We find no error in the charge. We do not think the court erred in denying the motion for a new trial.

We cannot say that the verdict, as reduced, was contrary to the great weight of the evidence. There was much conflict in the evidence. The jury were the triers of the facts, and they found for the plaintiff. It is not for us to pass upon a mere conflict in the evidence. We find no reversible error in the record, and the judgment of the court below is affirmed.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

BUTTERFIELD *v.* REYNOLDS.

1. RELEASE — CONTRACT — CONSTRUCTION — EVIDENCE — PAROL EVIDENCE.

A release is to be construed from the standpoint of the parties at the time they executed it; extrinsic evidence is admissible to explain the circumstances under which it was entered into and the nature of the transaction to which it was designed to apply without adding to or subtracting anything from the words used. It embraces all demands to which its provisions apply, whether contemplated or not, and direct parol evidence that a certain claim was not in-

Digitized by Google

cluded or contemplated in the preliminary negotiations is inadmissible.

2. SAME—CONTRIBUTION—EVIDENCE—NOTES—DEFENSES.

Plaintiff and defendant indorsed jointly with others the notes of a manufacturing corporation that subsequently became insolvent. In consideration that plaintiff would continue to act as indorser certain securities were deposited with him to cover his indorsement and protect him from liability, and at the same time, he executed to defendant a release in general terms "from all actions, causes of action, suits, controversies, claims and demands, whatsoever, for or by reason of any matter, cause, or thing from the beginning of the world down to the 6th day of April," etc. No other contractual obligations subsisted between them. Two months later, in order to renew one of the notes, defendant indorsed new paper, on which plaintiff sued for contribution. *Held*, that defendant was not liable; that the new note had been given for the indebtedness existing when they executed the release, and no new debt was created, that the release barred any liability upon the previous indebtedness, or a renewal thereof.

Error to Muskegon; Sullivan, J. Submitted October 13, 1915. (Docket No. 72.) Decided December 21, 1915.

Assumpsit by William W. Butterfield against Walter J. Reynolds for contribution on a note. Judgment for plaintiff. Defendant brings error. Reversed.

Cross, Vanderwerp, Foote & Ross (*Foreman, Levin & Robertson*, of counsel), for appellant.

William Carpenter, for appellee.

STONE, J. This is an action of assumpsit wherein the plaintiff seeks contribution from the defendant as a cosurety upon a certain promissory note hereinafter described. The issue was tried before the court without a jury, and the following findings of fact and conclusions of law were filed:

Digitized by Google

"I. On the 6th day of June, 1911, the following note was executed, indorsed, and delivered to the Hackley National Bank of Muskegon, Mich., viz.:

"'MUSKEGON, MICH., June 6, 1911.

"'On or before one month after date we promise to pay to the order of Hackley National Bank five thousand and no/100 dollars, at the Hackley National Bank. Value received, with interest at six per cent. per annum. Protest waived. $5,000.00 and int. Due July 6. No. 24986.

"'RACINE BOAT MANUFACTURING CO.,
"'By W. J. REYNOLDS, Pres.'

"On the back of which was indorsed the following:

"'The undersigned indorsers hereby expressly waive demand of payment, notice of nonpayment, protest, and notice of protest of the within note.

"'W. J. REYNOLDS,
"'PAUL B. MCCRACKEN,
"'WM. W. BUTTERFIELD,
"'NATIONAL BOAT AND ENGINE CO.,
"'Per G. W. THOMPSON, Asst. Treas.'

"II. Prior to April 6, 1911, the Racine Boat Manufacturing Company, a corporation, had sold and conveyed all its property to the National Boat & Engine Company, a corporation, which had assumed all its indebtedness, included among which was one to the Hackley National Bank for the sum of $5,000, evidenced by a promissory note indorsed by Walter J. Reynolds, Paul B. McCracken, and William W. Butterfield. When that note became due, it was renewed in form by the Racine Boat Manufacturing Company because the bank declined to take the note of the National Boat & Engine Company and release the Racine Boat Manufacturing Company, but the National Boat & Engine Company added its indorsements to that of the other three persons in order to make itself liable thereon. The note mentioned in paragraph one is a renewal of that note.

"III. In September, 1911, the National Boat & Engine Company was adjudicated a bankrupt in the District Court of the United States for the District of Maine. The Racine Boat Manufacturing Company, in

Digitized by Google

form the maker of said note, is insolvent. Paul B. McCracken, one of the indorsers thereon, is insolvent, and is not a resident or within the jurisdiction of this State.

"IV. The Hackley National Bank having made demand upon the plaintiff for the payment of said note, on the 3d day of January, 1913, he made a compromise with the bank and paid to the bank in extinguishment of its claim on the note the sum of $4,212.50, and on the 17th day of October, 1914, made due demand on the defendant for the payment to him of one-half of said amount, which was refused by the defendant.

"V. On the 6th day of April, 1911, the National Boat & Engine Company, the Racine Boat Manufacturing Company, and the plaintiff entered into the following agreement:

"'Whereas, there have differences existed between the National Boat & Engine Company, a corporation organized under the laws of the State of Maine, the Racine Boat Manufacturing Company, a corporation organized under the laws of the State of Michigan, and William W. Butterfield, of Muskegon, Mich., and all of those differences having been settled and adjusted with the exception of the contingent liability of the said Butterfield as an indorser on the outstanding notes of the said corporation; and

"'Whereas, the said Butterfield has agreed to continue his indorsements on said outstanding notes until the said corporations are able to pay and retire the same;

"'It is mutually agreed by and between the corporations aforesaid and the said Butterfield that he shall be protected and secured by the deposit in escrow with the firm of Cross, Vanderwerp, Foote & Ross, of Muskegon, Mich., of a sufficient number of first mortgage gold bonds of the National Boat & Engine Company, at the ruling market value thereof, and —— per cent. more to fully and generously indemnify and protect the said Butterfield upon his said indorsements.

"'It is further understood and agreed that this paper writing is but the memorandum of a contract, which is to be reduced to legal form and phraseology at Muskegon, Mich., with all convenient speed and dispatch to carry out the purposes and intentions of the parties, as embraced in a settlement and adjustment of their differences as made this day.

"'And it is further understood and agreed that the personal note of the said Butterfield for one thousand dollars ($1,000), secured by a one thousand dollar bond owned by the said Butter-

Digitized by Google

field, is the note and obligation of one or both of the said corporations, and not the personal indebtedness of the said Butterfield, and that, should a demand be made for the payment of said note, the said corporations, one or both of them, shall cause the same to be paid, and return the said bond to the said Butterfield.

"'In witness whereof the said corporations have on this 6th day of April, A. D. 1911, caused to be executed in triplicate this memorandum to be signed by their presidents and the seal of said corporations to be affixed by their secretaries; and the said William W. Butterfield has signed the same with his hand and seal.

"'NATIONAL BOAT AND ENGINE COMPANY,
"'By W. J. REYNOLDS, Its President. [Seal.]
"'Attest:
"'C. A. WILLIAMS, Secretary.
"'RACINE BOAT AND MANUFACTURING COMPANY,
"'By W. J. REYNOLDS, Its President.
"'Attest:
"'W. W. BUTTERFIELD, Secretary.'

"VI. On the same day the plaintiff executed and delivered to the defendant the following release:

"'Know all men by these presents that I, William W. Butterfield, of the city of Muskegon and State of Michigan, for and in consideration of the sum of one dollar to me in hand paid by Walter J. Reynolds, of the city of Muskegon, State of Michigan, do hereby release and forever discharge the said Walter J. Reynolds, his heirs, executors, and administrators, of and from all actions, causes of action, suits, controversies, claims, and demands whatsoever for or by reason of any matter, cause, or thing from the beginning of the world down to the 6th day of April, A. D. 1911. W. W. BUTTERFIELD.

"'In presence of C. A. WILLIAMS.'

"At the time of the execution and delivery of said release there had been and were no contractual relations between plaintiff and defendant other than the contingent liability of each to the other as coindorsers upon notes of the Racine Boat Manufacturing Company."

The finding also sets forth a supplemental agreement made and entered into on June 20, 1911, between the National Boat & Engine Company, the Racine Boat Manufacturing Company, and the plaintiff, reciting

Digitized by Google

that whereas, the National Boat & Engine Company was the successor to and had taken over the property of the Racine Boat Manufacturing Company, and had assumed the indebtedness of said Racine Boat Manufacturing Company, and whereas, a part of the indebtedness of said Racine Boat Manufacturing Company was represented by promissory notes given by said Racine Boat Manufacturing Company, and indorsed by said William W. Butterfield, and whereas, for the purpose of protecting said William W. Butterfield, said Racine Boat Manufacturing Company executed and delivered to him a certain deed of trust covering its property, to protect him against liability on said indorsements, and whereas, it was necessary that a portion of said promissory notes should be renewed by said National Boat & Engine Company, and whereas, said William W. Butterfield was the secretary of said Racine Boat Manufacturing Company, and was an employee of said National Boat & Engine Company, and whereas, there were certain items of indebtedness existing between said William W. Butterfield and said National Boat & Engine Company and said Racine Boat Manufacturing Company, it was among other things agreed as follows:

"Now, therefore, it is hereby agreed that all of the matters in difference, and all claims of any kind or character growing out of the relationship existing between the parties hereto, or any of them, or between said William W. Butterfield and Walter J. Reynolds and Paul B. McCracken, two of the stockholders and officers of said Racine Boat Manufacturing Company, and of said National Boat & Engine Company, are fully settled, paid, and discharged"—

a part of the consideration for said settlement being:

"*First.* That said William W. Butterfield shall surrender to the National Boat & Engine Company the deed of trust dated January 8, 1909, given to him by the Racine Boat Manufacturing Company for the pur-

Digitized by Google

pose of securing him from liability of any kind incurred by his indorsement on the promissory notes of said Racine Boat Manufacturing Company.

"*Second.* That said William W. Butterfield shall continue his indorsements on outstanding notes until said corporation or corporations are able to pay and retire the same; it being understood and agreed that said notes are to be paid and retired in the same relative proportion as other similar indebtedness of the National Boat & Engine Company.

"*Third.* That he shall be protected and secured in the making of said indorsements by the deposit in escrow with the firm of Cross, Vanderwerp, Foote & Ross, of Muskegon, Mich., of an amount of first mortgage gold bonds of the National Boat & Engine Company of the par value of double the amount of the total of the notes indorsed by said William W. Butterfield, which at this time are as follows: [Here follows a list of notes, including the note here sued upon, aggregating $44,000.]"

The findings of fact concluded as follows:

"VIII. That in order to secure the payment of the note, and of other indebtedness owing by the National Boat & Engine Company to the Hackley National Bank in January, 1911, the National Boat & Engine Company delivered to the bank as collateral security first mortgage bonds of the par value of ten thousand dollars ($10,000); that in the month of May, 1911, in order to indemnify the plaintiff against any loss by reason of his indorsement of said note, and of other notes indorsed by him for which the National Boat & Engine Company was liable, the National Boat & Engine Company delivered to Cross, Vanderwerp, Foote & Ross, as trustees, to be held in escrow for the benefit of the plaintiff $88,000 par value of the first mortgage bonds of the said corporation.

"IX. That the Hackley National Bank duly filed its claim for said note, and the bonds securing the indebtedness to it with the referee in bankruptcy for the District Court of the District of Maine, and on payment being made to it, as set forth in paragraph 4, it assigned said claim to the plaintiff; that the plaintiff also filed a claim with the said referee based on the $88,000

Digitized by Google

of bonds above mentioned; that the claim of the Hackley National Bank on the note was duly allowed, subject to the surrender by plaintiff of certain preferences claimed by the trustee, and determined by the referee, to have been received by him, but that the claim on all the bonds was disallowed by the referee; that his decision was reviewed in the District Court for the District of Maine, and the bonds delivered to the Hackley National Bank were allowed, subject to said preferences, but that the bonds delivered to Cross, Vanderwerp, Foote & Ross, as trustees, were disallowed, and that an appeal has been taken by the plaintiff to the Circuit Court of Appeals for the First Circuit of the United States, and is now pending and undecided; that the plaintiff has received nothing on account of said claims."

The following conclusion of law was found by the trial court:

"I find that the plaintiff is entitled to recover from the defendant one-half of the amount paid by him as aforesaid, to wit, the sum of $2,106.25, with interest thereon at the rate of 5 per cent. per annum from January 3, 1913, to the date of judgment, and that judgment be entered accordingly."

The defendant proposed the following amendment thereof, which was refused:

"I find as a conclusion of law that any right of action which plaintiff might otherwise have against defendant for contribution, by reason of his payment of the said note, is barred by the release of April 6, 1911, and the release contained in the contract of June 20, 1911, hereinbefore mentioned, and that judgment of no cause of action be entered accordingly."

Exceptions were duly taken to the conclusion of law and to the refusal of the court to amend the conclusion as proposed.

From a judgment for plaintiff entered pursuant to said finding, the defendant has brought error. By appropriate assignments of error the defendant claims:

Digitized by Google

(1) That the court erred in finding as it did in its conclusion of law, in refusing to find as proposed, and in entering judgment for plaintiff.

(2) That the judgment entered is not supported by the evidence, or by the law of the case.

(3) That the judgment entered is erroneous because plaintiff's supposed cause of action is barred by the release of April 6, 1911, and by the release contained in the contract of June 20, 1911.

(4) That the judgment is erroneous for the reason that, if plaintiff is entitled to recover at all, he can recover only one-fourth of the amount paid by him, with interest thereon, and not one-half of such amount as found by the court.

The first three assignments of error will be considered together. It is the claim of appellant that there is no liability of defendant for contribution on account of plaintiff having paid the note of June 6, 1911, because defendant was released from such liability by the general release executed and delivered by plaintiff to him on April 6, 1911; that said release was a general release and comprehensive in its terms, and the circumstances under which it was executed, and the purpose and intention of the parties, showed that it was intended to absolve defendant from all liability for contribution on account of his being a cosurety with the plaintiff on any and all indebtedness of the Racine Boat Manufacturing Company or the National Boat & Engine Company prior to April 6, 1911; that the note of June 6, 1911, which is the basis of this suit, is not a new indebtedness, but is a continuation of an indebtedness existing prior to April 6, 1911, and was therefore covered by the release executed and delivered by the plaintiff to defendant. We are impressed with this claim of the defendant. The closing words of the sixth finding of fact are significant:

"At the time of the execution and delivery of said release there had been and were no contractual relations between plaintiff and defendant other than the

Digitized by Google

contingent liability of each to the other as coindorsers upon notes of the Racine Boat Manufacturing Company."

It will be noted that the release given was of the most general kind, and very broad in its terms. Taken in the light of the circumstances under which this release was drawn and the purpose for which it was executed and delivered, we think that it was intended, not alone to release defendant from liability arising from his being a cosurety with plaintiff on any particular note or notes then existing, but that it was also intended to release defendant from all liability arising out of his being a cosurety on any indebtedness, as distinguished from evidence of indebtedness, existing at the time. The plaintiff testified that he did not consider either the defendant or McCracken as being financially responsible, and that he alone would probably be the one to whom the holders would ultimately look for the payment of this indebtedness, if it were not paid by the company; and he further testified that it was for the purpose of protecting himself against such contingent liability that he demanded security in the form of $88,000 of bonds of the National Boat & Engine Company, which he at the time considered ample security for all the indebtedness for which he was a surety. Having taken the security, it was only reasonable that he should release his cosureties. The claim of the plaintiff is not that the release was without consideration, or that it was obtained by fraud, but that:

"The release purports to discharge the appellant from all actions, causes of action, suits, controversies, claims, and demands whatsoever to the sixth day of April, A. D. 1911. It is apparent, therefore, on the face of the papers, that the note executed two months after the 6th day of April could give rise to no action, suit, controversy, or demand whatsoever that was contemplated by the release. The intention of the parties

Digitized by Google

as disclosed by the written instruments, the release, and the subsequent note is clear, and cannot be misunderstood. The release does not contemplate a discharge of the obligation of the appellant arising from the indorsement of the note. A release does not apply to any transaction in the future, unless it so specifies. *Whipple* v. *Parker*, 29 Mich. 369; *Mouat* v. *Hildebrand*, 15 Colo. 382 (24 Pac. 1042)."

In *Whipple* v. *Parker* it was held that a settlement could not, without evidence to that effect, reasonably be supposed to include or acknowledge payment, for what the party had not yet paid, and which at the time did not constitute an item of account, but accrued afterwards.

We think that the testimony of the plaintiff takes the instant case outside of the doctrine of the cited case. We think the position of the plaintiff, above quoted, too narrow. We should look to the substance of things, and consider the position of the parties and the nature of the surroundings. In the light of the circumstances under which the release was made, we think the fact that the original loan was made prior to the date of the release is material and important. We think there can be no question that it was the intention of the plaintiff to release defendant from any and all liability arising out of his being a cosurety, not alone on the notes which were only evidences of an indebtedness, but from all liability arising out of his being a cosurety for the indebtedness of the Racine Boat Manufacturing Company existing on April 6, 1911, and of which the note in suit is only a renewal or continuation, and not at all a new indebtedness. The bank had demanded the same indorsers upon renewal. While on the surface, and in so far as the bank was concerned, the old note was canceled by the giving of the new one, for the purpose of getting at the proper construction of the release in question and as between the parties here, we should consider, as the fact really was,

Digitized by Google

that it was only one of the evidences of the indebtedness that was canceled, and not the indebtedness itself. It is a general rule of construction of releases that a release shall be construed from the standpoint which the parties occupied at the time of its execution. 24 Am. & Eng. Enc. Law (2d Ed.), p. 290.

"Where only general words are used, they will be construed most strongly against the party executing the release, and so a release is held to include all demands embraced by its terms, whether particularly contemplated or not, and direct parol evidence that a certain claim was not in the minds of the parties is not admissible." *Id.* p. 294.

See 34 Cyc. p. 1076; *Rowe* v. *Rand*, 111 Ind. 206 (12 N. E. 377); *Seymour & Co.* v. *Butler*, 8 Iowa, 304; *The Cayuga* (Cir. Ct. of App. 6th Cir.), 59 Fed. 483 (8 C. C. A. 188); *Swinburne* v. *Swinburne*, 36 R. I. 255 (90 Atl. 121).

In *Rowe* v. *Rand*, *supra*, the court said:

"A release ought to be construed from the standpoint which the parties occupied at the time of its execution. To enable a court to so construe a release, extrinsic evidence is admissible to explain the circumstances under which it was executed, and the nature of the transaction to which it was designed to apply, without adding to, or subtracting anything from, the words used by the parties to the instrument. 1 Greenl. Ev. § 277; *Reed* v. *Insurance Co.*, 95 U. S. 23; 7 Wait on Actions and Defenses, 464.

"The particular purpose for which a release was executed ought always to be kept in view, and, where only general words are used, they are to be construed most strongly against the party executing the release. *Seymour & Co.* v. *Butler*, 8 Iowa, 304; *Rich* v. *Lord*, 18 Pick. [Mass.] 322; *Fazakerly* v. *McKnight*, 88 Eng. C. L. 795; *Solly* v. *Forbes*, 4 Moore, 488; *Lyall* v. *Edwards*, 6 Hurl. & N. 336; *Jackson* v. *Stackhouse*, 1 Cow. [N. Y.] 122 [13 Am. Dec. 514]."

In the *Cayuga Case* Judge Severens said:

Digitized by Google

"A release is held to include all demands embraced by its terms, whether particularly contemplated or not; and direct parol evidence that a certain claim was not in the minds of the parties is not admissible. *Deland* v. *Manufacturing Co.*, 7 Pick. [Mass.] 244; *Hyde* v. *Baldwin*, 17 Pick. [Mass.] 303; *Sherburne* v. *Goodwin*, 44 N. H. 271. The surrounding facts and circumstances may, as in other cases, be shown in order to apply the language of the instrument to its proper subject-matter, and prevent its application to a matter not involved in the transaction. Littledale, J., in *Simmons* v. *Johnson*, 3 Barn. & Adol. 175; 1 Greenl. Ev. §§ 286, 288."

To the same effect are *Palmer* v. *Corbin*, 1 Root (Conn.), 271; *Duff* v. *Hutchinson*, 57 Hun, 152 (10 N. Y. Supp. 857).

That the general release given by plaintiff to defendant was such as to release the latter from the contingent liability because of their being cosureties, see 32 Cyc. p. 284; 24 Am. & Eng. Enc. Law (2d Ed.), p. 312, and cases there cited.

In *Pierce* v. *Parker*, 4 Metc. (Mass.) 80, the court said:

"From the best examination I have been able to give to the question before us, I come to this conclusion: That, while a possibility merely is not the subject of a release, yet that in all cases where there is an existing obligation or contract between parties, although such obligation or contract is executory and dependent also upon contingencies that may never happen, still, if the party, in whose favor such obligation or contract is made, or who is liable, by force of it, to suffer damages if it is not performed by the other when the contingency happens, shall execute a release of all claims and demands, actions and causes of action, etc., correct in point of form, and having at the time of executing the release such obligation or contract in view, as one of the subjects upon which the release shall operate, then such release shall be held as a good and valid bar to any suit which may be afterwards brought upon such obligation or contract, or for money had, received,

Digitized by Google

or paid, upon the future happening of the contingency, in consequence of which the plaintiff sustains damage, and but for such release would have had a perfect right of action."

In our opinion, the release of April 6, 1911, was a valid bar to this action, and we need not consider the contract of June 20, 1911, only to remark in passing that the defendant was not a party to that contract. The conclusion which we have reached renders it unnecessary to consider the last assignment of error.

The judgment of the circuit court is reversed. and a new trial granted.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

CITY OF ANN ARBOR v. GOODSPEED REAL ESTATE CO.

1. ADVERSE POSSESSION—LIMITATIONS—STREETS — MUNICIPAL CORPORATIONS—IDENTITY OF LOCUS.

Defendants' adverse possession during a long period of time of a portion of the sidewalk in a city for a cellarway, created no rights to a different portion of the street which it later attempted to occupy with a new stairway in a building that subsequently replaced the original one.[1]

2. SAME—PRESCRIPTION—CITIES.

Act No. 46, Pub. Acts 1907, providing that no rights as against the public shall be acquired by reason of the occupancy or use of any public highway, street, etc., in any township, village, or city of the State, whether such occu-

[1] On rights acquired, as against the public by adverse possession highway or city street, see note in 18 L. R. A. 146.

Digitized by Google

pation or use be adverse or not, and the charter of said municipality enacted in 1867 containing similar provisions, prevented defendant from obtaining prescriptive rights after 1867, and, prior to that date, the evidence failed to show hostile use for a sufficiently long period of time.[1]

3. SAME—ESTOPPEL—MUNICIPAL CORPORATIONS.

In view of a city ordinance vesting in the board of public works authority to issue permits to occupy any portion of the street, defendant could not claim the right to possession of part of the street, by virtue of a permit that its predecessor in title secured from the city council to construct a cellarway, especially when he never acted upon it and did not convey his rights to the defendant, and the board of public works took no action in relation thereto.

Appeal from Washtenaw; Kinne, J. Submitted October 14, 1915. (Docket No. 83.) Decided December 21, 1915.

Bill by the city of Ann Arbor against the Goodspeed Real Estate Company and others for an injunction. From a decree for complainant, defendants appeal. Affirmed.

Frank B. De Vine (*A. F. Freeman*, of counsel), for complainant.

E. B. Norris and *J. W. Dwyer* (*Stuart E. Knappen*, of counsel), for defendants.

STONE, J. The bill of complaint in this cause was filed to restrain the defendants from removing a portion of the sidewalk at the southwest corner of Main and West Huron streets, in the city of Ann Arbor, and from the construction by defendants of a stairway within the line of said West Huron street leading to the basement of the building owned by the defendants, and known as the First National Bank Building, which

[1] An encroachment on public street or alley by occupier of abutting property for storage or other similar purposes as basis of adverse possession, see note in 36 L. R. A. (N. S.) 1056.

Digitized by Google

building fronts on Main street, with its northern side abutting on the south side of said Huron street and even with the lot line. The present building was constructed in the year 1907 by Frank P. Glazier, and the premises were purchased by the defendants in the fall of 1908.

The defendants claim a twofold right to remove said sidewalk and to construct said stairway in the public street north of said building, commencing at the northeast corner thereof:

First. They claim that for a period of 50 years and upwards, just prior to the construction of the present building, an open stairway leading to the basement of the store building then standing thereat had existed, and was owned, used, and occupied by the owner of the said store building, and that said stairway was, and continued for more than 50 years, appurtenant to the said store building and to the land upon which said store building then stood and where said defendants' building now stands, and that by reason thereof said stairway and stairway rights became and were appurtenant to said lands, and passed to the purchaser of said store building and land, and by good and lawful conveyance came to these defendants. At the hearing upon this branch of the case the defendants claimed their rights to the stairway by adverse possession, and that they had had continuous and exclusive possession thereof.

Second. The defendants also claimed that the common council of said city, at a session of that body held on the 30th day of August, 1907, granted the petition of Frank P. Glazier, praying that he be permitted to go from the Huron street side of said building to the basement thereof by a stairway leading from the outside, the same to be inclosed by ornamental railing, and that by reason of the granting of said petition of the said Glazier the city is estopped from claiming any relief under its bill of complaint.

The case, being at issue, was heard in open court. It appeared upon the hearing of the cause that one F. J. D. Crane purchased the premises on the southwest

Digitized by Google

corner of Main and Huron streets, in said city, in the year 1844, and that he erected a three-story building thereon in the year 1845. This building, like the present one, fronted on Main street. It remained upon this corner until torn down in 1906 to make way for the present building. When this building was erected in 1845 it was constructed with two outside stairways on the north or Huron street side of the building, one going up to the second floor, and one or more down to the basement. The stairway to the second floor started 4 to 6 feet west of the front of the building, and ascended in a westerly direction. It was 3 to 4 feet wide, and encroached upon Huron street by that much. The front stairway to the basement (the one about which we are concerned) was directly under the stairway leading to the second floor. It started from 15 to 20 feet back from the front of the building, and went down easterly, towards the front of the store, so that the opening in the sidewalk for this stairway was 15 or 20 feet west of Main street. While the testimony is clear that the stairway leading to the second floor continued to be used during the life of the old building, it is not so clear as to the continuance of the front stairway leading to the basement. Two witnesses who had early acquaintance with the premises testified on behalf of defendants. One was Col. Henry S. Dean. He was employed in this store in 1849. He was later absent some years, returning after the close of the War of the Rebellion in 1865. He is not certain whether there was any stairway leading into the basement under the stairs going up after his return, but is under the impression that there was. He thinks the first stairway was 25 or 30 feet back from the line of Main street.

H. J. Brown, another witness and old resident, was sworn, and testified that he had lived in Ann Arbor since 1879, and was in the drug business on the corner

Digitized by Google

of Main and Huron streets, and remained there until 1906. He was asked these questions upon direct examination:

"*Q.* Was there an outside cellarway entrance to this store?

"*A.* There had been one there some time. It was used as a coalpit or ashpit while I was there. It was never open while I was there, except once a year it was opened to take out ashes. There was no stairway there.

"*Q.* The steps were out of use?

"*A.* Yes; and it was covered over.

"*Q.* A wooden covering?

"*A.* I think it was wood; I am not sure about that whether it was wood or stone. * * *

"*Q.* Where was this ashpit or cellarway located?

"*A.* It was— I should think it was perhaps 10 or 15 feet back from the corner of the building.

"*Q.* Right under this stairway that went up to the second floor?

"*A.* Yes. * * *

"*Q.* There was a stairway from the inside of the building to the basement?

"*A.* Yes; in the back end of the store.

"*Q.* So that you could go into the basement from the inside of the store?

"*A.* Yes."

On cross-examination he testified as follows:

"*Q.* You were in that building from 1879 to 1906?

"*A.* Yes.

"*Q.* Until the building was sold?

"*A.* Yes.

"*Q.* Until that building was torn down and this building was constructed that is there now?

"*A.* Yes; I was notified to get out. They were contemplating tearing down the building.

"*Q.* And during all that time there was no outside stairway to that building to the basement?

"*A.* No.

"*Q.* Whatever openings there had been were closed, and they were used as places to store coal, and so forth?

"*A.* Yes."

Digitized by Google

This witness also testified that about 1884 or 1885 he permitted an Italian to go under the stairway leading to the second story where he could go to get out of the storm, and that it was so used off and on, from that time until he moved out of the building. It further appeared that in 1867 the charter of the city contained the following provision:

"No person shall be deemed to have gained any title as against the city by lapse of time, to any street, lane, alley, common or public square heretofore laid out or platted by the proprietors of said city, or any part thereof, by reason of any encroachment or inclosure of the same."

It also appeared that on November 4, 1895, an ordinance was passed by the common council of the city of Ann Arbor providing as follows:

"Sec. 1. It shall be unlawful for any person, firm or corporation, having a permanent location in this city that is adjacent to or abutting upon any sidewalk or street or other public place, to build or erect any stairway leading upwards from any sidewalk, or any sidewalk leading down to any area or basement so as to encroach upon the width of the sidewalk or street.

"Sec. 2. The board of public works shall not give a permit to any person, firm or corporation to make any excavation in any street, alley or other public place, or tear up or remove any sidewalk, pavement or street surface for the purpose of erecting or building any stairway prohibited in section one of this ordinance."

The legislature of this State, in 1907, by Act No. 46 of the Public Acts of that session, passed the following act, entitled "An act in relation to acquiring title to real estate by adverse possession:"

"Sec. 1. Hereafter no rights as against the public shall be acquired by any person, persons, firm, association, copartnership, joint stock company or corporation by reason of the occupation or use of any public highway, street or alley, or of any public grounds, or any part or portion thereof, in any township, village

Digitized by Google

or city in this State, whether such occupation or use be adverse or otherwise.

"Sec. 2. All acts or parts of acts in any wise inconsistent with or contravening any of the provisions of this act are hereby repealed.

"This act is ordered to take immediate effect. Approved April 17, 1907."

It appeared upon the hearing of the case that on August 30, 1907, Frank P. Glazier, while engaged in the erection of the present building, presented to the common council a petition as follows:

"TO THE HONORABLE COMMON COUNCIL OF THE CITY OF ANN ARBOR.

"Gentlemen:

"Your petitioner, Frank P. Glazier, respectfully represents to your honorable body that he is the owner of the new building being erected on the corner of Huron and Main streets, in the city of Ann Arbor, and that, in order to get to the pressroom in the basement of the building, it will be necessary to have a stairway leading from the outside down to the pressroom, and will be inclosed by ornamental railing.

"Therefore your petitioner respectfully asks that your honorable body permit him to go from the Huron street side of said building to the pressroom by means of a stairway, not to exceed three feet, to be erected when permission is granted to your petitioner by this honorable body.

"Respectfully submitted,

"FRANK P. GLAZIER."

The petition was granted by unanimous vote of the members of the council. It is not claimed that any permission was obtained from the board of public works to make said proposed stairway. The evidence is undisputed that Mr. Glazier did not construct the stairway at all, but that the sidewalk was built entirely from Main street west along the side of said building. It does appear, however, that before the filing of the bill of complaint, the defendants, acting through D. C. Goodspeed, relied upon the permission

Digitized by Google

that had been granted to Mr. Glazier, as above stated, and they were informed by the city clerk that they could go ahead and build the stairway. Proceeding to do so, they were stopped by the injunction issued herein. Some proceedings were had both by Mr. Goodspeed and the council after the pleadings were put in in this case, which we shall not refer to.

At the close of the testimony and argument of this case, the opinion of the court was announced as follows:

"The evidence in this case tends to show that the building which stood on the corner of Main and Huron streets, in the city of Ann Arbor, was built about the year 1845. It was occupied at that time by the firm of Crane & Co., and Col. Dean worked for a year or so as clerk in their employ. At that time there seems to have been two stairways leading down from Huron street into the basement of the building. How long the stairways continued to be used for entrance to the basement does not appear from the testimony, and I see no reason to indulge in a presumption of continuance in regard thereto. The testimony of Mr. Brown, who occupied this corner in the year 1879, shows that at the time of his occupancy these stairways had been boarded up, one of which he used as an ashpit, putting therein the ashes from the furnace in the store, and opening the same once a year and removing the ashes; and the testimony would seem to indicate that the other was used, in part at least, for putting coal down into the cellar. There is no evidence in the case of when the building was first used in this manner, or when the stairways were first used in this manner, and I see no reason, as before stated, for indulging in a presumption of continuance for the time necessary to gain title by adverse possession, nor do I see in this case any evidence from which I am compelled to draw the conclusion that such use of the stairway was adverse or hostile. It is quite possible that some arrangement existed between the city of Ann Arbor, or the village of Ann Arbor, at the time these stairways were constructed, and the owners of the store. My belief in this regard is all the stronger be-

Digitized by Google

cause the evidence shows beyond controversy that, when Mr. Glazier acquired the property, he prepared plans for the erection of the store as it exists at the present time, with the possible exception that he intended to put a stairway into the basement; but, instead of relying upon any adverse and hostile possession, he immediately applied to the common council of the city of Ann Arbor for a permit to put a stairway in. After the title of the property passed from Mr. Glazier to his representative in bankruptcy, the plan of putting in the stairway seems to have been forever abandoned, and the sidewalk was built over the place in which it was designed to place a stairway, and the property was sold under those circumstances to the defendants in this case. * * * Mr. Glazier applied for permission, and, when it was given to him, he did not exercise the permission. I understood they cut out a place in the steel to put in a stairway. Under those circumstances it does seem to me there was no acceptance of the permission given by the city of Ann Arbor, if the common council was the proper body to give permission, which perhaps may be given a question of doubt, and certainly the permission did not run with the land and continue forever. For these reasons it seems to me the relief should be granted as prayed for in the bill of complaint."

A careful reading of this entire record satisfies us that the trial court reached the correct conclusion. There are a number of reasons why the defendant cannot prevail here upon the ground of prescriptive right, or right of adverse possession. In the first place, the evidence does not show that there was ever any excavation in the sidewalk at the corner of Main and Huron streets where it is now proposed to open one, but that the opening, when it did exist, was back from Main street from 15 to 25 feet. There is no evidence of adverse possession of the *locus in quo*.

We are not satisfied that there was any such continuous, uninterrupted, hostile, open, and notorious possession as would constitute adverse possession, but we think the contrary appears. It does not appear,

Digitized by Google

therefore, that title by adverse possession had been acquired prior to 1867. Since that time defendants are in no position to claim that they, or their predecessors, have acquired title by adverse possession.

In the light of the legislation, local and State, we do not think it can be successfully claimed that the complainant is estopped from obtaining relief in this case. The only permission granted was by the common council in the face of the ordinance which gave this power to the board of public works, and it was a permission given personally to Mr. Glazier, which has never been acted upon, and cannot be said to have been conveyed by him to the present owners. No rights, appurtenant or otherwise, can be claimed to have been obtained under the circumstances by that permit.

The decree of the circuit court is therefore affirmed, with costs to the complainant.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

NEWELL *v.* REID.

SALES—WARRANTY—ACTIONS—EVIDENCE.

Evidence that plaintiff bought bran of the defendant which he fed to two cows and they died with symptoms of arsenical poisoning, that what remained of the feed was screened, a portion submitted to a chemist who analyzed the sample and found traces of arsenic amounting to about a grain to one and a half ounces, that the bran had been swept up off the floor of defendant, who used rat poison on his premises, though he introduced evidence to show that the poison contained no arsenic, was sufficient to sup-

Digitized by Google

port a verdict for plaintiff and warranted an inference that the bran contained poisonous material.

Error to St. Clair; Tappan, J. Submitted October 15, 1915. (Docket No. 115.) Decided December 21, 1915.

Case by John Newell against James Reid and another for breach of warranty of a quantity of bran. Judgment for plaintiff. Defendants bring error. Affirmed.

Clair R. Black and *John B. McIlwain,* for appellants.

Walsh & Walsh (*C. L. Benedict,* of counsel), for appellee.

OSTRANDER, J. It is alleged in the plaintiff's declaration that he purchased from defendants bran to feed to cattle, that defendants sold him the bran for such use, that the bran was not fit and proper for such use—

"and was mixed with and contained poisonous substances and unwholesome and deleterious material, and was entirely worthless and of no value and unfit for such use and of a poisonous and unwholesome nature; and the said plaintiff, * * * relying upon said promises and warranties, fed such bran and materials to certain live stock, to wit, two cows then and there the property of said plaintiff of the value of, to wit, $300, which thereupon, by reason of its unwholesome and poisonous nature, immediately became sick and soon thereafter died as a result of eating said bran and materials aforesaid."

The court refused a peremptory instruction favorable to defendants. Defendants then presented, and the court submitted to the jury, two special questions, namely:

"Do you find from the preponderance of the evidence in this case that the two cows of the plaintiff died from arsenic poison, and not from other causes?

"Do you find from a preponderance of the evidence

Digitized by Google

in this case that at the time of the sale of the bran to plaintiff there was arsenic in the small sack sufficient to kill the two cows?"

To each question the jury returned an affirmative answer, with a general verdict for plaintiff of $140.

It is certified that the bill of exceptions "has been made sufficiently full and complete so that the Supreme Court on writ of error may by going over the same be able to make an examination of the entire case."

It is the contention, and only contention, of defendants, appellants, that the answers to the special questions and the general verdict are not supported by testimony. In considering this contention, it is assumed that the record contains substantially all of the testimony given at the trial. Otherwise, it would be presumed that testimony had been given which supported the findings of the jury. *Stevens* v. *Rose*, 69 Mich. 259 (37 N. W. 205). The assumption is based upon what seems to be the fair meaning of the certificate above referred to.

The contents of the stomachs of the two cows which died, and which the plaintiff claims were poisoned, were not analyzed. However, the testimony for the plaintiff tended to prove that both cows were fed bran from a package purchased from defendants, both died, exhibiting symptoms of arsenical poisoning, the remainder of the contents of the package was screened, a portion of the material was submitted to a chemist, and he found upon an analysis that it contained arsenic. Further, the testimony tended to prove that when it was sold to plaintiff the bran was not in the packages purchased by defendants from the manufacturer of the bran, but had been resacked by defendants after having been turned out upon the floor of their barn, or storehouse. The smaller package, claimed to have contained the noxious substance, or substances, had in it, besides bran, pieces of bread and meat. The

Digitized by Google

chemist tested a portion of a sample of 1½ ounces of this material, consisting of a mixture of bread, bran, meat, dirt, and hairs, and found arsenic, and estimated that in the 1½ ounces there was probably a grain of arsenic. Defendants used rat poison about their premises on several occasions, putting it upon bread and meat. A box of the material screened from the smaller sack of bran, and like that sent to the chemist, was exhibited to the jury. It is not mere conjecture, but an inference, based upon testimony, that the smaller sack of bran contained sweepings from the storehouse floor and included portions of bread and meat and rat poison, which ought not to have been sold for food for cattle. There was testimony tending to prove that the rat poison used by defendants contained no arsenic, and different persons might have reached different conclusions concerning the preponderance of the evidence. That there was testimony supporting the finding is, I think, clear.

The judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

LOUD v. DEACON.

HIGHWAYS AND STREETS—SECTION LINES—LAYING OUT—INJUNCTION—EVIDENCE.

In proceedings to restrain defendant from laying out a highway along a quarter line from the section center, according to a survey made by the highway commissioner, also

Digitized by Google

involving the discontinuance of an existing highway claimed not to have been located on the correct line, *held*, that the finding of the trial court that the proposed highway was not located correctly but south of the true quarter line, by mistake, was supported by competent evidence, that it justified a decree granting an injunction against the establishing of the highway.

Appeal from Alcona; Connine, J. Submitted October 12, 1915. (Docket No. 42.) Decided December 21, 1915.

Bill by H. Nelson Loud, Charles Wallace, and Culver Van Alstyne against Frank Deacon, Louis Clouse, John W. Ferguson, George Sampson, Charles Aldrich, and James Aldrich to restrain defendant Deacon from laying out a highway. From a decree for complainants, defendants appeal. Affirmed.

Henry, Henry & Henry, for complainants.

John A. Stewart (*Charles A. Jahraus*, of counsel), for defendants.

OSTRANDER, J. The petition for the laying out of a highway described the proposed highway as "commencing at the center of section 26, and running half a mile east on surveyed line." Before the petition was filed, the highway commissioner had caused a survey to be made. Prior to the laying out of the highway in question, there had been a highway by user running east and west north of the line of the disputed highway. Certain persons, claiming that the highway was not on the quarter line, but ran north of it and on their land, procured the discontinuance of it and petitioned for the laying out of the one in dispute, claiming its route is along the true quarter line. Complainants collectively own the north half of south half of section 26, and defendants other than the highway commissioner

Digitized by Google

own the south half of north half of the section. Complainants filed the bill to enjoin the laying out of the new highway. There was a decree in their favor.

The court found, first:

"That the discontinuing of the old highway and the laying out of the new one were all upon the theory and claim that the old highway was not upon the quarter line; that, therefore, it should be discontinued, and a new one laid out upon the quarter line. It is conceded by the complainants that the proceedings to lay out the highway in question were regular."

The court finds the questions involved to be: Is the highway upon the true quarter line? If not, can it be enjoined, the regularity of the proceedings being conceded? The first question the court answered in the negative, finding that the original quarter post could easily be located by field notes and other unquestionable testimony. The second question was answered in the affirmative, and the reasons given as the following:

"The defendant commissioner was attempting to establish a new highway upon this quarter line, but he made a mistake as to the line. This is not the case of an attempt to establish a highway upon some line other than the quarter line, so that question need not be considered.

"The commissioner has not located this highway upon the correct quarter line, but has located it elsewhere, by mistake. This highway as established does not run upon the quarter line, but runs south of that line and over and upon complainants' lands; it does not run where the commissioner's petition asked to have a highway located, nor where his answer in this case alleges it runs. The complainants' lands have been taken without due process of law. It is not suggested by defendants that complainants had an adequate remedy at law, and it is difficult to see where they had such remedy."

In this court the defendants, appellants, make two contentions. One of them is that the corner (quarter

Digitized by Google

post) at the center of section 26 was lost and had to be and was re-established by the survey relied upon by the highway commissioner. The other is that if it is in fact north of the point established by said survey, and if the proposed highway does not run on the true quarter line, it is also true that highways may be laid out without following quarter lines, and the proceeding is a lawful one. From the answer of defendants it cannot be doubted that the highway commissioner is proposing and attempting to lay out a highway on the true quarter line as determined by the United States survey, and there is no doubt that he believed, and is in fact asserting, that the true quarter line is the line established by the recent survey. Therefore, he construed the petition which set his department in motion as a petition for a highway upon the quarter line of the section. This would seem to remove from consideration appellants' second contention, namely, that whether it is or is not on the true quarter line, the highway may nevertheless be laid out. Appellants' refer to 2 Comp. Laws, § 4040, which provides that when a highway shall be laid out parallel to and within half a mile of an already existing highway, the damages for any lands taken shall not be estimated at less than the value of such lands for general farming purposes. In view of the petition for the highway, and the answer of defendants, the point whether a highway commissioner may lay out a highway not on a quarter line does not seem to be involved. An examination of the record shows that the second conclusion of the court below is abundantly sustained by evidence.

The decree must be affirmed, with costs to appellees.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

LEEVER v. CENTRAL CITY LUMBER CO.

EJECTMENT—BOUNDARIES—ALLEY—DESCRIPTION.

Where plaintiffs in ejectment had conveyed to the defendant a parcel of land described as lots 15, 17, and land lying east thereof, bounded on the northwest by Michigan avenue, east by Milwaukee street, formerly Albany street, on the south by Wesley street and on the west by an alley contiguous to lot 17, and no alley appeared in the original plat, as prepared for filing by the owner, and lot 17 did not have the alleged alley but included said land, described by metes and bounds, that the plat had never been filed in the office of the register of deeds and was at an early date lost, the deed from plaintiffs to defendant carried with it all the property purporting to be transferred, including the alleged alley, which did not show upon the premises and which was not in actual use, and which defendant, who had been in possession as tenant, occupied with the rest of the realty; plaintiffs' contention and evidence that because an abstract furnished to defendant after entering into a contract for the purchase of the land, contained a map with parallel lines that they alleged represented the alley across the lot, is *held* to be insufficient to prove title in the grantors who admitted that no open and used alleyway had ever existed on the lot,—no public or private way existing in fact. And a reservation did not result from describing the parcel as bounded on the west by an alley.[1]

Error to Jackson; Parkinson, J. Submitted October 12, 1915. (Docket No. 61.) Decided December 21, 1915. Rehearing denied June 23, 1916.

Ejectment by Fred O. Leever and another against the Central City Lumber Company. Judgment for defendant. Plaintiffs bring error. Affirmed.

[1] The effect of bounding grant on private way to carry title thereto is discussed in note in 24 L. R. A. (N. S.) 539.

Digitized by Google

Grove H. Wolcott, for appellants.

Price & Whiting, for appellee.

The action is ejectment to recover possession of a parcel of land in the city of Jackson, described in the declaration as:

"Commencing at the southeast corner of lot 17 in block 3 south of range 2 east according to Stratton's survey; thence east along the north line of Wesley street 16½ feet; thence north to the south line of Michigan avenue; thence northwesterly along the south line of Michigan avenue to the northeast corner of said lot 17; thence south along the east line of said lot 17 to the place of beginning."

Testimony for plaintiffs tended to prove the following facts: Alonzo Bennett in 1865 acquired title by warranty deed to an undivided one-half and in 1868 to the other undivided one-half of premises described as:

"Commencing at the southwest corner of lot seventeen (17) in block three (3) south, range two (2) east, in the city of Jackson, county of Jackson, State of Michigan; running thence north to Mill street; thence southeasterly on the south line of Mill street to Albany street; thence south on the west line of Albany street to Wesley street; thence west to the place of beginning."

Plaintiffs, as husband and wife, in 1908 took from the heirs of Alonzo Bennett a warranty deed, describing land as follows:

"Lots fifteen (15) and seventeen (17) in block three (3) south, range two (2) east, according to Stratton's survey; also a parcel of land lying east of said lot seventeen (17) bounded on the northeast side by Michigan avenue, formerly Mill street, on the east by Milwaukee street, formerly Albany street, on the south by Wesley street, and on the west by an alley contiguous to lot seventeen (17) aforesaid."

Digitized by Google

Dated December 15, 1911, a quitclaim deed was executed by the Bennett heirs to plaintiffs conveying:

"Commencing at the southeast corner of lot 17, block 3 south, range 2 east, according to Stratton's survey; thence east along the north line of Wesley street 16½ feet; thence north to the south line of Michigan avenue; thence northwesterly along the south line of Michigan avenue to the northeast corner of said lot 17; thence south along the east line of lot 17 to the place of beginning. The purpose of this conveyance is to grant to the parties of the second part hereto, their heirs and assigns, all right, title, and interest which parties of the first part had in and to the above parcel of land on the 7th day of October, 1908."

Plaintiffs made a lease to defendant, dated June 10, 1908, of lots 15, 17, and 18, and the west half of lot 16, block 3 south, of range 2 east, excepting a small cottage, the lease containing the following stipulation:

"Part of said premises are at present under lease to John Middaugh whose lease of same expires May 1, 1909; * * * The part which said Middaugh occupies being lot 17 and 18. * * *"

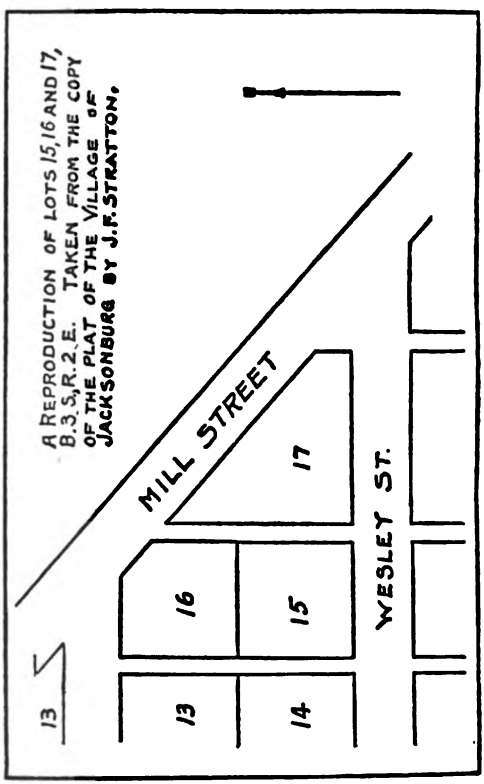
Under date October 26, 1911, plaintiff Fred O. Leever acknowledged in writing the receipt from defendant of a sum of money to apply on purchase price of lot 17, lot 15, and the west half of lot 16, with the exception of that part lying west of Michigan Central Railroad track, block 3 south, of range 2 west, city of Jackson, agreeing to furnish an abstract of title and convey by warranty deed. An abstract was furnished, attached to which was a plat or map. The caption to this abstract was—the property abstracted as shown by recital—lots No. 15 and 17 in block 3 south, of range No. 2 east in the city of Jackson according to the recorded plat of the village of Jacksonburg;

"also a parcel of land lying east of above-described land and bounded on the northeast side by Michigan avenue, formerly Mill street, and on the east by Mil-

Digitized by Google

waukee street, formerly Albany street, and on the south by Wesley street, and on the west by an alley contiguous to lot 17 aforesaid."

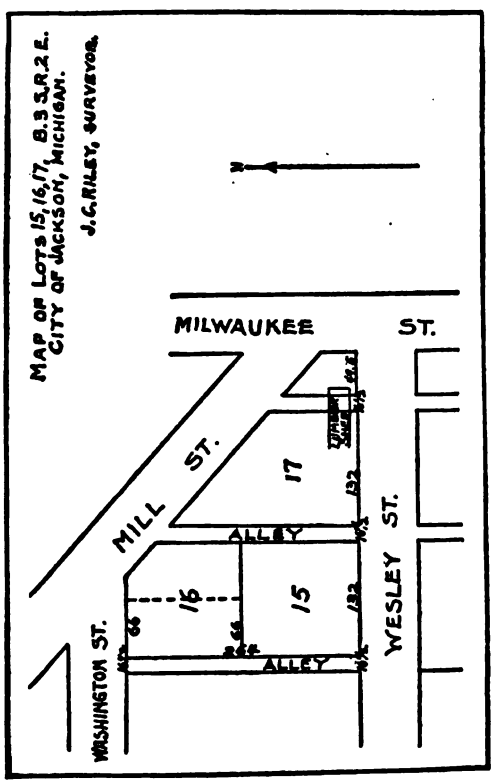
The deed executed by plaintiffs to defendant describes lots 15 and 17 and west half of lot 16 (with exception). The premises held by defendant as lessee of plaintiffs had for 20 years or more before this suit was begun been surrounded by a fence. Defendant used them for a lumber yard. The premises were a part of the land surveyed and platted as the village of Jacksonburg by one J. F. Stratton, which plat included the older portion of the city of Jackson and was



Digitized by Google

made in the year 1830. What purports to be a copy of the Stratton plat is recorded, with an affidavit which recites that the plat was made and deposited in the office of the register of deeds for Washtenaw county for record, was lost before record, and that the annexed plat is a true copy of the original. As shown by this plat as recorded, the premises appear to lie as indicated on the opposite page.

There are maps of the city of Jackson, including the territory platted as the village of Jacksonburg. Names of streets, and perhaps their courses, have been changed. New streets have been laid out. A copy of the plat which was attached to the abstract furnished defendant follows:



Digitized by Google

It is said in the reply brief of plaintiffs and appellants:

"It is not claimed by the plaintiffs that there ever was an open and used alleyway between lot 17 and the parcel east thereof, but they do insist that the same was represented upon the original survey and referred to in the deed from the Bennett heirs to the plaintiffs, and also in the abstract furnished defendant, and in the caption thereto and in the plat attached to said abstract, and that defendant had full opportunity for knowledge of the situation with regard to such alley and its boundaries at the time the deed was delivered."

Plaintiffs' testimony tended to prove, further, that for the premises, including lot 18, they asked $15,000, and excluding lot 18, $12,000. Defendant paid $12,000 for what it purchased. Plaintiffs' witness Francis D. Bennett testified that he drew the deed from the Bennett heirs to plaintiffs.

"I got that description in that deed from one of those little folding maps I have had for a good many years. I think it was made by Mr. Fargo; one I have had in my desk for a good many years. In that deed we conveyed lot 17 and a description of a parcel which was not numbered as a lot. The parcel with reference to 17 was east of it, separated by a strip 16½ feet. It was an alley. I do not say 16½ feet, but those alleys usually are 16½ feet. There was never any alley at that point designated there open to the public and used during the time I have known the premises. The reason why I omitted the alley in the deed to Leever and wife from the Bennetts in 1908 was because that property had been carried on my father's books as No. 15 and 17 and 18, and I had always supposed that this piece east of lot 17 separated by an alley which showed on my map in that way was lot 18, but when I came to draw this deed I found this was not numbered as No. 18, so I deeded it—described it. My map showed an alley, a continuation in line with the alley which is open from Wesley street south. That map is a Fargo map. It showed an alley across between what my father had

Digitized by Google

called, I suppose, 17 and 18. I supposed he had no deed for it. I supposed he simply had a deed for lot 17 and what he called 18, so I deeded those two pieces, thinking we had no recorded title to the alley—merely possession. * * * Leever and wife held this property from myself and brothers under contract for some time before they got the deed. During that time they held it under contract they made a lease to the Central City Lumber Company. Myself and my brothers ratified the lease by the writing at the bottom of the lease. In that lease, as well in the contract, that land is referred to as lots 17 and 18. I have no recollection that we had more than one contract with Leever covering that piece of property. The deed of the Bennett heirs, I think, was given in 1908. Mr. Leever and wife went into possession of all that land there under that contract referring to the property as lots 17 and 18, and when the lease was given to the Central City Lumber Company they also went into possession, I believe, of the land under the description of 17 and 18. I knew of their having possession afterwards.

"*Q.* You intended those descriptions to cover that property, and supposed it had?

"*A.* No, sir; I don't think I intended it to cover that property. I intended they should have that property, but I didn't understand the description covered the property.

"*Q.* Were you reserving something, or did you describe the property in such a way you understood you were not describing all of it when you made that contract and lease; is that what you are getting at?

"*A.* Yes, sir; I did describe. I did not describe all I supposed they were getting.

"*Q.* I didn't ask you that. I say: Did you, when you used that description, intentionally use a description which you knew did not cover all the property which was understood by the parties to be covered?

"*A.* I can't say—that isn't—I can't say 'Yes' or 'No' quite to that, Mr. Price. The facts are I intended them to have that property. I supposed my father only had a deed to the lots, and not to the alley, so I simply gave them those two lots, thinking it would carry the alley with it; that those two lots would carry the alley the same as he had; that those two lots would carry

Digitized by Google

the alley with it, the same as he had. I intended that description to carry the property, but decided not to describe it. It was so used by the parties in the negotiations to carry that property. There was nothing said by me at any time to the Central City Lumber Company or Mr. or Mrs. Leever at the time that contract and lease was made that there was anything to be reserved; that they did not get the whole thing. It was explained to Mr. Leever that he got that alley with those two lots, that I was deeding him the two lots, two separate pieces, and that the alley went with it. We always had possession, and he would get it with it. There was something said to Mr. Leever about the alley. I said that to him. I didn't have any dealing with the officers of the defendant, and said nothing to them. * * * Preceding the giving of the quitclaim deed Mr. Leever came to me. I had my talk and conversation with him entirely at that time, to the best of my knowledge. Pursuant to that myself and my brothers finally gave this quitclaim deed. I negotiated the business for my two brothers. Mrs. Leever did not then take any active part in it according to my recollection."

There was hanging in the office of defendant before and at the time the option was given and the deed to them executed a map of the city of Jackson which showed, as the Fargo map does, an alley extending across lot 17.

For defendant there was testimony tending to prove that there has never been at any time visible evidence of an alley on the east side of lot 17. No one looking at the premises could distinguish the line between lot 17 and the parcel called 18. No mention was made of an alley in the negotiations of plaintiffs and defendant. No officer of the defendant examined the abstract or the plat attached to it. It was submitted to its attorney, Mr. Price, for examination and opinion concerning the title to the land described in the option or receipt. The price asked by plaintiffs for all the land they held, all of it being occupied under lease by defendant, was $15,000, which included $3,000 for lot

Digitized by Google

18. Before the option already referred to was drawn, plaintiff Fred O. Leever, but not in the hearing nor immediate presence of his wife, and not with her knowledge, so far as is made to appear, pointed out to the defendant's officers the east line of lot 17, indicating that it was a line in continuation of the east line of the alley on the south side of Wesley street. In an argument concerning the admissibility of this testimony, counsel for defendant said:

"This is my theory about it, if your honor please: The deed calls for lot 17, block 3 south, range 2 east, referring to no survey at all, Stratton or anybody else. Their theory is that that description means the Stratton survey, or, as they call it, the Packard map. That is their theory. That really means lot 17, block 3 south, range 2 east, according to the plan of the village of Jacksonburg by Stratton. They have got a copy of that in evidence. We contend it, according to that plan they have got in here, goes clear out to Albany street. Don't mistake our position about that. We claim that goes clear out to Albany street, even as shown on the map itself, but it was never treated that way by these people. That is conclusively shown. They have put in a deed here—a lease and other papers there before you now—in which lot 18 is spoken of, which they say never was in the plan of the village of Jacksonburg. Never having been there, where did it come from? Our answer to that is this, and it is consistent with our other position: It never was there. 17 went clear out to Albany street or Milwaukee street, and when they made lot 18 they took part of 17 for 18. Those two positions are exactly consistent. They divided 17 because it was a large lot, and they called the east end of it lot 18, and that is why we do not find any 18 on the original survey—no 18 there. But there is an 18 in the dealings between these parties that we can't get over. They choose that term in their lease. It was so on the books of Alonzo Bennett and Mr. Frank Bennett says he doesn't know how it came to be that way, but it was treated that way. Now, having divided this property and covered the whole thing, and designating it by 17 and 18, they

Digitized by Google

commence to negotiate about the purchase of all of it. They fixed upon a price of $15,000, that is the price asked. He asked a separate price for lot 18, lot 18 spoken of in their lease, the lease signed by Mrs. Leever, as well as Leever. He asked a separate price of $3,000 for that lot. They think that is too much for that one lot. They had rather take the balance without that than to pay $3,000 for that one lot. So the option was drawn, and they get all of it but lot 18."

At the hearing in this court the book of plats in which the so-called Stratton plat was recorded was produced. An examination of it showed that lot 17 extended east to Albany, now Milwaukee, street. No other plat was introduced in evidence.

OSTRANDER, J. (*after stating the facts*). Defendant has and claims no title except that derived from the plaintiffs. Plaintiffs had title to a parcel of land described as lot 17. This title defendant acquired. What are the dimensions, boundaries, of lot 17? It is clear that Alonzo Bennett, plaintiffs' grantor, had title to all of the land east of the alley, which it is admitted bounds lot 17 on the west. In the deeds running to Mr. Bennett the land is described by its boundaries, not merely as lot 17, and in neither deed is a plat referred to. No testimony tends to prove that any owner opened, laid out, or dedicated an alley crossing lot 17. No such alley was acquired in condemnation proceedings. No testimony tends to prove that a private alley was opened and used, for convenience, across lot 17. There was therefore, in fact, no public or private way east of the west line of lot 17 as described in the conveyances which are in evidence. Apparently it was Mr. Bennett who first divided the original lot 17, not in fact, not by a plat, but by a memorandum which appears to conform to pictures or maps made by others and in common use. He called the east end of lot 17 lot 18; and, when his heirs sold the property in 1908,

Digitized by Google

the deed executed by them describes both lot 17, and by boundaries, but not by dimensions, a piece of land lying east of lot 17, which, by recital, had an alley for its western boundary. When this deed was executed, the grantees therein, by their tenant, the defendant, had possession of all of the land. Mr. Francis Bennett, who prepared the deed, was mistaken in supposing that his father had no title to the land now claimed to have been an alley. The recital in the deed affected no rights of the grantor or grantees therein, because the grantees had then, by their tenant, the defendant, possession and control of the entire premises. No reservation to the grantor was intended by the recital in the deed that the parcel east of lot 17 was bounded on the west "by an alley contiguous to lot 17." The title to all of the land resting in Mr. Bennett, no reservation as between the parties to the deed resulted. No public right was affected.

As between the plaintiffs and defendant it was understood that lot 17 did not extend so far to the east as Milwaukee street; that there was land east of lot 17, title to which did not pass by the deed. It is unfortunate that the dimensions of the parcel intended to be conveyed as lot 17 were not stated in the deed. No alley was talked about, and the bargain for the purchase and sale of the property was made before an abstract was furnished or examined. There being no alley in fact, it is necessary to consider whether for the purposes of this action, between the parties to the deed which describes and conveys lot 17, there is an alley 16½ feet wide on the east side of lot 17 and between that lot and the parcel called in the lease lot 18. If there is, it is because lot 17, as described, had, to the knowledge of defendant, the dimensions which plaintiffs now assign to it. To establish knowledge, or notice equivalent thereto, the caption to the abstract which was furnished, the plat attached thereto, and the

Digitized by Google

description in the deed from Alonzo Bennett to plaintiffs are relied upon.

It must be assumed from all of the testimony, because the inferences to be drawn therefrom are necessary ones, that while only a portion of the deeds in the chain of title refer in terms to the Stratton plat, all of them do, in fact, refer to it. This agrees with plaintiffs' contention. Upon the plat is a scale to which, it is asserted, it is drawn. According to this scale, the dimension of lot 17 on Wesley street is about 193 to 195 feet. It is about 1⅝ inches on the plat. According to the Fargo map, so-called, purporting to be drawn to the same scale, this dimension of lot 17 is said to be 132 feet, excluding the alley and lot 18. It shows no lot 18. But Fargo's map shows the alley, which never existed in fact. No authority is proven in him to make such a map as he made. It does not delineate what, in fact, existed there. The testimony is conclusive that none of defendant's agents examined the plat attached to the abstract. The attorney who examined the abstract was of opinion that plaintiffs had title to lot 17, and looked no further.

At the most, therefore, the notice which defendant had from the descriptions in the chain of title was that Mr. Bennett, in deeding to plaintiffs, recited as a boundary for the west side of the parcel east of lot 17 an alley. Its dimensions, its location, and its character are not given. The fact that Mr. Leever pointed out to defendant the eastern boundary of lot 17 cannot be used to affect the title of Mrs. Leever. She conveyed lot 17, and is not bound in this action by what her husband, without her knowledge, may have said as to its dimensions or boundaries.

I conclude that plaintiffs have not proven title in themselves to the land in dispute, have not established the fact that the land is not a part of lot 17, and that the court should so have advised the jury. It is sug-

Digitized by Google

gested whether, upon plaintiffs' theory, a reformation of the deed they gave to defendant is not essential to the establishment of their alleged rights.

Judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

HOEY v. ROSS.

1. COMPROMISE AND SETTLEMENT—CHECKS—CONDITIONAL PAYMENT—OFFER AND ACCEPTANCE—ACCORD AND SATISFACTION—ESTOPPEL.

Acceptance by plaintiffs of a check sent by defendants in full settlement of a purchase of logs, bearing on its back the statement that it was in full settlement of the timber that had been received and if not correct, to return check, indorsment meant receipt in full, barred any action for an alleged balance on account, the amount of indebtedness having been in dispute, and operated as a compromise of the items in controversy, although plaintiffs replied to defendants' letter accompanying the check that they had applied the remittance on account, and claimed a balance unpaid of $1,207.24.[1]

2. SAME—BURDEN—EVIDENCE.

Under testimony of an undisputed character, that defendants sent the check indorsed as above and that plaintiffs accepted their proposition by cashing it, there was no question for the jury; the evidence satisfied the burden of proof resting on the defendants and the issue was one of law.

---

[1]On accord and satisfaction by part payment, see note in 20 L. R. A. 785.

On acceptance of remittance of part of the amount of an unliquidated or disputed claim, accompanied with the statement that it is "in full" or words of similar import, as assent to its receipt in full payment, see notes in 14 L. R. A. (N. S.) 443, 27 L. R. A. (N. S.) 439.

Digitized by Google

Error to Bay; Collins, J. Submitted October 15, 1915. (Docket No. 126.) Decided December 21, 1915. Rehearing denied April 21, 1916.

Assumpsit by William T. Hoey and Henry D. Franks, copartners as the Western Cedar & Lumber Company, against John C. Ross and Norris R. Wentworth, copartners, etc., for goods sold and delivered. Judgment for defendants on a directed verdict. Plaintiffs bring error. Affirmed.

I. S. Canfield, for appellants.

Stoddard & McMillan, for appellees.

OSTRANDER, J. The action is assumpsit for the value of certain sawlogs. With the plea defendants gave notice that they would prove in their defense, among other things, that, the plaintiffs having made a demand upon defendants for a large sum of money claimed to be due to plaintiffs for the logs mentioned in plaintiffs' bill of particulars, defendants in good faith disputed the amount of the demand, and, the parties being unable to agree with respect to the amount due to plaintiffs from defendants, the defendants offered and tendered to the said plaintiffs, in full payment, settlement, and satisfaction of plaintiffs' demand on account of said logs, the sum of $1,797.45, for which amount defendants gave their check to plaintiffs in compromise and settlement of the plaintiffs' said claim, and the same was received and accepted by the plaintiffs under and in accordance with the terms and conditions accompanying the said offer and tender.

Testimony was introduced tending to prove the truth of these matters, and the trial court, being of opinion that an accord and satisfaction was conclusively established, directed a verdict for defendants. If the direction was right, other questions raised by assignments of error need not be considered.

Digitized by Google

The demand of the plaintiffs was unliquidated. The statement, letter, and check of the defendants, dated December 15, 1914, went to plaintiffs after a considerable correspondence between the parties, which correspondence indicates clearly that neither accepted the factors which the other employed in arriving at the sum which defendants ought to pay. As early as September 10, 1914, plaintiffs claimed to have completed the delivery of logs under its contract of March 14, 1914, and sent to defendants a statement which showed an unpaid balance of $3,004.69. This statement was questioned by defendants, who also asserted that plaintiffs had not delivered the logs as they had contracted to do. After some correspondence and after the logs had been freighted by boat or by rail from Thunder Bay, where plaintiffs were to deliver them, to Bay City, at defendants' cost, and on November 27, 1914, plaintiffs again requested defendants to pay their demand. Statements of account were exchanged which showed that they were made by one party according to one theory of the contract and by the other according to another theory. Finally, under date December 15, 1914, defendants sent forward to plaintiffs a statement of account, which need not be here reproduced, and a letter and check. The letter is as follows:

"WESTERN CEDAR & LUMBER CO.,
"Alpena, Mich.

"*Gentlemen:*

"Inclosed please find our check No. 10349 for $1,797.45 in full of account to date per inclosed statement. We have gone over your account carefully, and we feel that we cannot accept the Guy Eaton scale in determining average of logs, as we had nothing to do with this scale and it was not made by a party mutually agreed on. If we were to allow you to put this scale in in determining averages, you would show according to your report 13837 feet Balm of Gilead, when all the balm that we cut out of all of your logs was 7211 feet, so you can see that there would be a great error in your way of figuring.

Digitized by Google

"In regard to the logs that are full of driftbolts and spikes which we have deducted in making settlement, these logs are here and are subject to your order at any time you may want them. We certainly cannot use them and you had no right to put them in.

"Trusting you will find this settlement satisfactory and in order, we are."

The check was drawn by defendants on the Bay City Bank in favor of plaintiffs. It was indorsed:

"This check is in settlement of invoices as follows: In full account of all claims and demands for moneys due in connection with logs purchased by us through our Mr. R. G. Evans, delivered by you to us at Bay City, as per statement rendered herewith. $1,797.45. If above is not correct, return check indorsement means receipt in full."

Plaintiffs received the check probably on December 16th, and later indorsed the check and cashed it. Under date December 23, 1914, they wrote defendants:

"We are in receipt of your check No. 10349 for $1,797.45, for which we thank you and will apply the same on your account. We do not wish to take legal steps to collect the balance due on your account, and are asking you to please send us check for the amount still due, which is $1,207.24. If you do not send us check for this balance at once, we will be forced to commence suit to recover the same, as this amount is too large for us to lose and we do not think you have treated us fairly in this matter."

It is said in appellants' statement of facts, and repeated later on in the brief, that plaintiffs disputed the fact that the words, "if above is not correct, return check indorsement means receipt in full," were indorsed on the check when they received and indorsed it. No page of the record is referred to and no testimony supporting this statement. The court in charging the jury said, "In my opinion it is an undisputed fact that they were there."

It is assumed that defendants had the burden of proving accord and satisfaction; indulging which as-

Digitized by Google

sumption, the ruling of the trial court must be sustained. The facts are not in dispute; the legal effect of them is a question of law. It is not claimed that the dispute of the parties was not a good-faith difference, and, if it was honest, it affords the basis for an accord between the parties, which the law favors. There can reasonably be no dispute concerning the intention of the debtors in offering the check, nor about the condition which accompanied the offer. It is not suggested that any element of a complete accord and satisfaction is doubtfully established except the one of the creditors' intention in receiving and cashing the check. The creditors' intention, it is said, is a matter to be determined by a jury. But as the debtors' intention is determinable from what they did, so may the intention of the creditors be—and must be—determined by what they did. Neither fraud nor attempted fraud, nor duress, nor mistake, affected their conduct. The tender made by the debtors was upon condition, and the creditors were bound so to understand it, and to understand the condition unequivocally expressed. The creditors had the alternatives of accepting or returning the check. It was accepted, and cashed.

In none of the causes heretofore determined in this court have the facts relied upon to establish an accord been precisely like those in the case at bar. It is the rule in this State that, if it is doubtful if an accord—an agreement—is established, the question is for the jury. But the principle which sustains the ruling of the trial court and requires an affirmance of the judgment in the case at bar has been repeatedly recognized and applied. The subject is exhaustively reviewed, with references to the decisions of the Federal and State courts, in 1 C. J. pp. 520-584.

The judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

MORTON *v.* ROTH.

INTOXICATING LIQUORS—NEGLIGENCE—THIRD PERSONS—CIVIL DAMAGES—ACTION—AUTOMOBILES.

Where plaintiff, in a civil-damage action, had received injuries to his person as the result of reckless driving of a minor with whom he was riding in an automobile that they borrowed without the owner's consent, and where it appeared that they had visited several saloons and became intoxicated, and that the plaintiff treated the minor, who in his turn had paid for refreshments for both, plaintiff, being of age, was chargeable with helping to bring about the accident and could not recover damages under 2 Comp. Laws, § 5398 (2 How. Stat. 2d Ed. § 5074), which creates a remedy against the saloon keeper for the benefit of innocent third persons.

Error to Muskegon; Sullivan, J. Submitted October 14, 1915. (Docket No. 97.) Decided December 21, 1915.

Case by Benjamin M. Morton against Henry Roth and another for unlawful sales of liquor to a minor whereby plaintiff claimed to have suffered personal injuries. Judgment for defendants on a directed verdict. Plaintiff brings error. Affirmed.

Sutherland, Johnson & Sessions, for appellant.

S. Wesselius, for appellee Roth.

A. F. Bunting, for appellee Michigan Bonding & Surety Co.

OSTRANDER, J. The statute (2 Comp. Laws, § 5398; 2 How. Stat. [2d Ed.] § 5074) provides that:

"Every wife, child, parent, guardian, husband, or other person, who shall be injured in person or property, or means of support or otherwise, by any intoxi-

Digitized by Google

cated person or by reason of the intoxication of any person, or by reason of the selling, giving or furnishing any spirituous, intoxicating, fermented, or malt liquors, to any person, shall have a right of action in his or her own name, against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury. * * *"

It is alleged in the declaration that defendant Roth, on July 6, 1914, sold and furnished liquor to one Clare McMahon, a minor, to be drunk and which was drunk by said minor in defendant Roth's saloon, and that said McMahon then and there became grossly intoxicated; that McMahon, while so intoxicated, invited plaintiff to ride in an automobile belonging to a third person, and while plaintiff was a passenger in the automobile, driven by McMahon, the car suddenly swerved and dashed into the side of the road, throwing McMahon and plaintiff to the ground, injuring the plaintiff.

The testimony for the plaintiff tended to prove: That at the time mentioned in the declaration plaintiff was 22 years old, born in the city of Muskegon, and an acquaintance of McMahon. Shortly after the noon hour, July 6, 1914, he and McMahon, who was 18 years old, were in company visiting saloons in the city of Muskegon, each of them buying for himself and the other, and drinking, liquor. Among other places, they visited the saloon of defendant Roth, and there bought and drank liquor, and bought and carried away a bottle of whisky, which each contributed money to pay for and which they drank. Their itinerary appears to have taken them to eight or more saloons, to some of them more than once, and to the red light district. At some time in the evening, the hour not definitely fixed, they took an automobile which they found upon the street, and, with McMahon driving, enjoyed a ride. Both claim to have been so drunk that they have no

Digitized by Google

very distinct recollection about taking the car or about the ride. At the end of the pavement on one of the streets, when the car passed upon the dirt or earth roadway, it was mismanaged, or because of the speed attained became unmanageable. It was wrecked, and both men were injured; plaintiff very severely.

Plaintiff having rested his case, the court was moved to direct a verdict for defendant, for the reasons:

"*First.* That the plaintiff is not entitled to sue the defendant in this case under the statute permitting the recovery of damages for any unlawful sales of liquor, not belonging to one of the classes that are authorized to bring such suits.

"*Second.* Because it appears from the plaintiff's proof that he himself purchased liquor, being an adult, for Clare McMahon, and permitted Clare McMahon to purchase liquor for him, and that they both drank the same in saloons and other places set forth in the declaration, and that thereby the plaintiff became one of the joint tort-feasors in the case at bar, and is estopped from bringing this action against this defendant, because he is a joint tort-feasor.

"*Third.* Because it appears that the plaintiff being an adult, negligently and without due and proper care for himself, purchased intoxicating liquors to excess, and himself indulged in intoxicating liquors to excess, and when so intoxicated acquiesced in the unlawful taking of an automobile, and himself unlawfully took the automobile which resulted in the injuries complained of in the declaration.

"*Fourth.* That the proximate cause of the injury was the excessive use of intoxicating liquors by the plaintiff, the unlawful taking of the automobile, and the accident resulting from such taking, and not the sale of liquors, if any were made by the defendant."

A verdict was directed as requested, and judgment was entered on the verdict. The ruling is assigned as error.

A few, and only a few, cases under the statute have reached this court in which the plaintiff was other than an innocent third person injured by an intoxicated per-

Digitized by Google

son, or by reason of the intoxication of some person, or by reason of the unlawful selling of intoxicating liquor to some person. In *Brooks* v. *Cook,* 44 Mich. 617 (7 N. W. 216, 38 Am. Rep. 282), the plaintiff had his pocket picked while he was intoxicated. He was refused relief. In *Heikkala* v. *Isaacson,* 178 Mich. 176 (144 N. W. 508, 50 L. R. A. [N. S.] 857), the plaintiff, while drinking with another, or with others, and while himself somewhat intoxicated, was struck by an intoxicated person, who used a beer glass, and an eye was destroyed. There appears to have been some testimony tending to prove that the plaintiff may have aggravated—did aggravate—by conduct or language, or both, the person who struck him. A judgment for the plaintiff was affirmed, and in affirming it the charge of the trial court was approved which advised the jury that if they found the conduct of plaintiff aggravated his assaulter, the fact would be no defense. There was an affirmative act of violence, committed by an intoxicated person upon the plaintiff. But in *Rosecrants* v. *Shoemaker,* 60 Mich. 4 (26 N. W. 794), where a wife brought her action under the statute for furnishing liquor to her husband, there was testimony tending to prove that she authorized defendants to furnish liquor to her husband, and that she herself procured it for him. A request to charge that:

"If the jury find that, for her husband's use, as a beverage, the plaintiff was in the habit of purchasing of defendants intoxicating liquor by the bottle, they may consider that as evidence for the purpose of determining whether she authorized them to sell her husband liquor or not"

—was refused, as well as the request that:

"If the jury find that defendants were authorized by plaintiff to furnish her husband liquors, she cannot recover damages for injuries sustained by reason of defendants having furnished her husband liquor, unless he was intoxicated when such liquors were furnished."

Digitized by Google

This court, speaking through Mr. Justice CAMPBELL, said:

"As the wife sues solely in her own behalf, it is evident that she cannot complain of any evil which she has herself caused, and that, if she encouraged or requested the sale of liquor to her husband, she does not stand on the footing of an innocent injured party."

In *McDonald* v. *Casey*, 84 Mich. 505 (47 N. W. 1104), the principle of *Rosecrants* v. *Shoemaker* is recognized. See the distinction made in *Thomas* v. *Dansby*, 74 Mich. 398 (41 N. W. 1088). The courts of other States have recognized the same principle. *Reget* v. *Bell*, 77 Ill. 593; *Engleken* v. *Hilger*, 43 Iowa, 563. It does not appear, affirmatively, in the opinion in the case last cited, that the action was founded on a statute. See, also, Black on Intoxicating Liquors, §§ 292, 307.

In the case at bar, there was no act of McMahon—no affirmative act, like a blow or other trespass—which caused plaintiff's injury. And plaintiff himself participated in furnishing liquor to McMahon, a minor. He paid for liquor which the minor drank, and drank with him. He was guilty of furnishing liquor to a minor and to an intoxicated minor. Both took the car of a third person, and, while McMahon drove the car, the adventure was a mutual one. Those who sold the liquor are undoubtedly responsible in a criminal action. But plaintiff is seeking to recoup himself, in a pecuniary way, for consequences for which he was directly and actively responsible. In my opinion, he is not an "other person" within the meaning of the statute sued upon, and the ruling and direction complained about were right.

The judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

STEVENS v. LAKEWOOD UTILITIES CO.

1. COMPROMISE AND SETTLEMENT—CONTRACTS—WORK AND LABOR.
Plaintiff, who supplied defendant's ice house with ice, was not entitled to a directed verdict in his favor where he and defendant settled a dispute with regard to the manner in which he had packed the ice, by agreeing that defendant should pay a substantial part of the price agreed upon before March 24th and the balance on May 15th, if the ice was in good condition at the date named, and where the evidence was in conflict whether the ice was in good or in poor condition at the stipulated time, the issue raised was for the jury.

2. SAME—EVIDENCE—VALUE.
Evidence to show the value of the work done was therefore immaterial; if the ice was in fact in good condition at the date agreed upon, plaintiff should have been permitted to recover the deferred payment; if not, defendant was entitled to a verdict.

3. SAME—ISSUES—DIRECTING VERDICT.
The trial court erred in excluding evidence relative to the condition of the ice at the time fixed by plaintiff and defendant according to the later contract; and it was also erroneous to advise the jury that plaintiff might, although they found he was in default, recover a part of the deferred payment.

4. SAME—FORFEITURE—INSTRUCTIONS TO JURY.
There was reversible error at the trial in charging the jury that the settlement between the parties provided for a forfeiture and that the law abhors a forfeiture.

Error to Muskegon; Sullivan, J. Submitted October 13, 1915. (Docket No. 73.) Decided December 21, 1915.

Assumpsit by Samuel Stevens against the Lakewood Utilities Company for a balance claimed to be due on

Digitized by Google

a contract to fill defendant's ice houses. Judgment for plaintiff. Defendant brings error. Reversed.

Cross, Vanderwerp, Foote & Ross, for appellant.

Turner & Turner, for appellee.

The initial written evidence affecting the issue is the following:

"CHICAGO, January 21, 1914.

"I, Samuel Stevens, agree to fill three icehouses belonging to the Lakewood Utilities Company and B. C. Mayo for the sum of two hundred and eighty dollars. This sum is to include all materials to be furnished without additional charge by me, except the materials for slide, which are to be furnished by the company, if possible, or if furnished by me, are to be paid extra for.

"The services of Mr. Alex Ferguson as helper at two dollars a day are to be deducted from the amount of two hundred and eighty dollars for whatever time he puts in on this work.

"It is understood that this work should be done at whatever time the weather conditions permit"

—which was signed by the plaintiff. He filled the three icehouses and sent the defendant his bill, which the defendant received, and on March 4, 1914, wrote him that his bill would be honored after defendant had received a report. Under date March 7th, defendant wrote plaintiff that he had received a most unsatisfactory report in regard to the quality of the ice; that it was not 10 inches thick; a quantity of it had 3 or 4 inches of snow on top; that it was packed too close to the center walls on both sides; and that the inside wall (between two icehouses) had been cut through to allow the ice to be shifted back and forth. Later, under date March 16th, defendant wrote plaintiff, reaffirming the charges that the ice was of poor quality and improperly stored, and suggesting that plaintiff could remedy the conditions in part. Under date March 19th plaintiff wrote the manager of defendant the following letter:

Digitized by Google

"WHITEHALL, MICH., March 19, 1914.

"MR. MAYO,
"Chicago, Ill.

"*Dear Sir:*

"In reply to yours of March 16th, I have been to the icehouse and replaced the ties that were removed to get the ice in. I have also rearranged the packing on the ice but I surely will not molest the ice for there is no better ice to be had than that already in the house. Now I will tell you what I will do; you pay me $220.00 on or before March 24, 1914, and I will look after the ice and keep it packed and in good shape until May 15, 1914. If the ice is in good shape at that time (May 15, 1914) then I am to receive the remainder of my contract money, but if the ice is not in good keeping order then I forfeit the remainder of my contract money."

The subsequent correspondence is here set out in full:

"CHICAGO, March 20, 1914.

"*Dear Sir:*

"In re yours of the 19th, will say that the arrangement you propose seems satisfactory on the face of it. We will pay you $220.00 before April 1st, 1914, provided you look after the ice and keep it packed in good shape until May 15th, 1914. At that date you are to receive the remainder of your contract money, provided the ice is in good shape and satisfactory to us, but if the ice is not in satisfactory condition, you agree to forfeit the remainder of your contract money. Please confirm this letter."

"WHITEHALL, MICH., March 23, 1914.

"MR. G. G. MAYO,
"Chicago, Ill.

"*Dear Sir:*

"I have just received yours of March 20th, accepting my proposition of the 19th inst. Your acceptance is one-sided wherein it states the ice must be satisfactory to you upon May 15th. This gives me no voice in the matter whatever. However, I will pass it as it is, trusting you to do the square thing by me. I will expect the $220.00 before April 1st, 1914."

Digitized by Google

"CHICAGO, March 24, 1914.

"*Dear Sir:*

"I have just received yours of March 23d accepting our recent proposition, and we will send you check for $220.00 as your first payment on your contract with us, as hitherto stated, before April 1st, 1914."

"CHICAGO, April 1, 1914.

"MR. SAMUEL STEVENS,
"Lakewood, Whitehall, Michigan.

"*Dear Sir:*

"We are inclosing herewith check for two hundred twenty ($220.00) dollars to apply on contract dated January 21st, 1914. The balance of $60.00 will be remitted to you on May 15th if ice is satisfactory at that time."

"WHITEHALL, MICH., May 16, 1914.

"LAKEWOOD UTILITIES CO.

"*Gentlemen:*

"As per agreement I have taken care of ice and kept it packed in good shape to May 15, 1914. There is remaining due me on my contract the sum of $57.80. You will please attend to this at once."

"CHICAGO, May 20, 1914.

"MR. SAMUEL STEVENS,
"Lakewood, Whitehall, Michigan.

"*My Dear Mr. Stevens:*

"I have received the report that the ice in the icehouses is in very bad condition. I will personally inspect it next Sunday, May 24th, at which time you can see me, and we can arrange settlement at that time."

This action is brought to recover the balance of $57.80, and interest, alleged to be due to the plaintiff.

It is the contention of the plaintiff that he substantially performed, as he agreed to perform, the contract to fill the icehouses, and was therefore entitled to receive the contract price when the work was completed; that the claim of the defendant that he had not substantially performed his contract was not a good-faith claim, nor based upon facts; that the subsequent arrangement indicated by the correspondence was without consideration in so far as it amounted to a post-

Digitized by Google

ponement of his right to receive the balance due him, and that in any event the claim of the defendant that the ice was not satisfactory on May 15, 1914, was captiously made. Upon this theory testimony was taken and the case submitted to the jury, which returned a verdict in favor of the plaintiff, upon which judgment was entered.

It is the contention of the defendant, appellant, that the testimony showed beyond question that it was a matter of dispute between the parties whether plaintiff had performed his contract in a substantial manner; that this dispute was settled and adjusted by the making of a compromise agreement, according to which plaintiff was to be paid $220 on April 1, 1914, and the remainder of the contract price if the ice was in good condition and satisfactory to defendant May 15, 1914; otherwise he was to receive no further pay; that the testimony shows beyond question that on May 15th the ice was not in a condition satisfactory to defendant, was insufficiently packed with sawdust, had melted materially around the edges, and had fallen one-third of the height inside of the icehouses; that it was therefore the duty of the court to direct a verdict for the defendant upon its motion.

Error is assigned upon a ruling of the court excluding a letter written by defendant to plaintiff under date March 7, 1914, in which is recited the particulars of the condition of the ice reported by defendant's agent, the argument being that the letter was important as tending to show an honest claim on the part of defendant that the plaintiff's work was improperly done.

Error is assigned upon a ruling admitting an answer to a question asked plaintiff:

"Q. Was your work worth—the work that was done there fairly worth the sum—the contract price?"

Counsel for the defendant was reading a deposition to the jury. A certain objection having been made by

Digitized by Google

plaintiff's attorney, the court examined the deposition. The question asked the witness was:

"In what condition did you find the ice? Please describe fully."

A part of the answer to this question having been read, the court, having examined and marked the deposition, said:

"Read that answer there excepting the part in brackets. Read the question before it and that part of it not marked out. There is a lot of stuff included in the answer that I think ought not to go in, and I have eliminated the parts that I think ought not to go in in the answer, and that part will be stricken out, and you may read the answer."

The portion of the answer excluded contained the statement, "There was an insufficient amount of sawdust used in packing." For defendant the court, having concluded the charge to the jury, was requested to further instruct, and refused to instruct, the jury that plaintiff, having accepted the check for $220, after the stipulated time for payment, which was before April 1st, and thereafter continued in performance of the compromise agreement, cannot set up the default of defendant in not paying before April 1st. The charge of the court is criticised, seven errors being assigned. In substance, the criticism is that issues were submitted when no such issues were made by the testimony; that the charge was argumentative, the argument being favorable to plaintiff. Among other things, the court said:

"If it [the ice] was in poor shape—if really it was in such a poor condition and packed in such a poor condition that it was in poor shape, then this man ought not to recover the whole $57.80 but should recover what you say it was worth to the defendants who used the ice, not to exceed $57.80."

Digitized by Google

OSTRANDER, J. (*after stating the facts*). The undisputed testimony presented a single issue for the jury, which was whether the ice on May 15, 1914, was in good shape, in good keeping order. I am satisfied that the trial court intended to submit this as the controlling issue. A charge of considerable length was given which, when read in its entirety, seems to present other issues and to permit a recovery by plaintiff, no matter in what condition the ice may have been on May 15, 1914.

The ice was stored for the purpose of keeping it for use in warm weather—for use after May 15th—and there are, of course, proper and improper ways of storing it. Plaintiff was, or professed to be, satisfied that his work had been well done. Defendant was protesting that it was illy done. There can be no question about this. The issue might have then been determined according to the facts. It was plaintiff who proposed that time, and some care on his part, would demonstrate that the ice was well stored, a proposal assented to by defendant. It was agreed that the condition of the ice on May 15th should determine whether plaintiff should or should not be paid the remainder of the contract price. If the ice was then in reasonably good condition, defendant could not refuse payment. However plaintiff may have construed the bargain, the matter in no way involved the personal tastes, sensibilities, fancy, or individual judgment of the party to be satisfied. It is therefore evident that the value of the work actually done was immaterial, and equally evident that if the ice was not in fairly good condition on May 15th the jury was not at liberty to measure the portion of the reserved payment plaintiff ought to receive. Upon the real issue both parties were entitled to present the testimony tending to prove the actual conditions on May 15th, they having agreed, in writ-

Digitized by Google

ing, that such condition should determine whether plaintiff should receive any further sum. Plaintiff did not regard the fact that the $220 reached him after April 1st as a breach of the arrangement finally made. On the contrary, he professed to thereafter continue to do what it had been agreed he should do. His final demand was based upon the proposition that:

"I have taken care of the ice and kept it packed in good shape to May 15, 1914. There is remaining due me on my contract the sum of $57.80."

It was error to admit testimony to prove the value of the work done by plaintiff; error to exclude testimony tending to prove the condition of the ice May 15th; error to advise the jury that plaintiff might, notwithstanding default on his part, recover some portion of the deferred payment; error to instruct the jury that the agreement of the parties provided for a forfeiture of $57.80, and that the law abhors a forfeiture.

It is most unfortunate that a cause involving so little should be remanded for a new trial. However, such must be the order.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

LARDIE *v.* TRAVERSE CITY IRON WORKS.

SALES—WARRANTY—EVIDENCE.

Evidence, in a suit for breach of warranty of a motor truck, considered and *held*, insufficient to support a recovery, and not tending to show a breach, or that the seller had warranted the truck in any way differently than the manufacturer whom he represented had warranted it.

Digitized by Google

Error to Grand Traverse; Lamb, J. Submitted October 14, 1915. (Docket No. 84.) Decided December 21, 1915.

Assumpsit by James Lardie against the Traverse City Iron Works for breach of warranty of a truck. Judgment for plaintiff. Defendant brings error. Reversed.

H. C. Davis and *Parm C. Gilbert*, for appellant.

Patchin & Duncan, for appellee.

It is alleged in the declaration that on or about September 15, 1913, as an inducement to a purchase by the plaintiff of the defendant of a certain motor truck, defendant promised and represented to plaintiff that it was practically a new truck, had been used very little as a demonstration truck by the manufacturers, was as good as a new truck except for the wear upon the tires, had been overhauled, recalipered, and remachined by the manufacturers, was as good as a new machine and in perfect condition; that it would make 14 miles an hour; its carrying capacity was one ton; it would do plaintiff's work satisfactorily, that defendant understood that the use to which plaintiff would put it was carrying loads from plaintiff's home near Old Mission, Mich., to Traverse City; that, relying upon these promises, the plaintiff purchased the truck for $1,150 and paid for it; that it would have been worth $1,150 if it had been of the kind and in the condition that it was represented and warranted to be by the defendant, but that in fact it was worth, when delivered, not to exceed $400; it was not practically a new truck, but was an old machine, and had been used a long time, and its parts were badly worn; one of the cylinders was scored, all of them badly worn; the truck did not have the power that it was represented to have;

Digitized by Google

the steering arm was worn and in such condition as to make it unsafe to operate the truck; the transmission gear and the other parts were worn and defective; it was not a good truck for the purposes for which it was purchased; had not been thoroughly overhauled, recalipered, and remachined by the manufacturers; it did not have a carrying capacity of one ton; it would not do plaintiff's work satisfactorily, nor in the manner that a good truck in good condition would do it. The defendant pleaded the general issue. Upon the trial it appeared, and is not disputed, that defendant, to the knowledge of plaintiff, was the agent at Traverse City, Mich., of the Federal Motor Truck Company of Detroit; that the defendant sold the plaintiff a truck for $1,150, at Detroit, and the plaintiff paid for it. The conditions of the sale are in dispute, and the relevancy and effect of testimony which was introduced respecting the terms and conditions of the sale were at the trial, and are now, made a matter of contention. It is the plaintiff's theory that he had a parol warranty from the defendant, for a breach of which he brings this action. It is the theory of the defendant that the only warranty the plaintiff had was the warranty of the manufacturers, and that the defendant by parol offered its own responsibility in addition to that of the manufacturers with respect to the manufacturers' warranty, and no other.

It is agreed that the truck which was sold and purchased was a second-hand truck, had been used by the manufacturers, and that it was purchased, as above stated, for the price of $1,150; that the defendant knew that the manufacturers had the truck, that it was for sale, the price at which it could be furnished, and informed the plaintiff; but it also appears that, as a part of the negotiations for its purchase and sale, the plaintiff signed a contract, addressed to the Federal Motor Truck Company, Detroit, Mich., a blank form of

Digitized by Google

which the defendant had, which gave the model, the purchaser's name, the wheel base, the purchaser's address: . .

"Make of tires, same as now on. Kind of business, general farming. * * * Lettering, Fruit Ridge Farm, Old Mission. Prices, Chassis and seat, in priming coat, $1,800.00. Price painted, $1,815.00"

—with other details. This was signed by the plaintiff. The blank under the signature of the purchaser which reads:

"Accepted at Detroit, Michigan, by Federal Motor Truck Company. By——,"

was not filled in, but the further indorsement was:

"Sold by Traverse City Iron Works. By H. O. Joynt."

On the back of this instrument was a printed guaranty, the principal and important portion of which is:

"We guarantee Federal Motor Trucks against defective material and workmanship for a period of one year from date of shipment, and will replace free of charge any parts broken by reason of such defects, providing such parts are returned to our factory for our inspection, transportation charges prepaid, tagged with the name of the sender, the number of the truck from which part was taken and the reason for returning.

"This guaranty does not apply to claims arising from accidents, misuse, neglect, nor does our guaranty apply to chains or special equipment.

"Our guaranty ceases on any Federal truck on which the governor seals have been broken.

"The purchaser understands and agrees that no other guaranty of the Federal Motor Truck is made, or authorized to be made by the company or its agents, other than the above set forth."

This has below it the printed signature: "Federal Motor Truck Co.," and, following that:

"This contract is subject to the approval of an executive officer of the Federal Motor Truck Company,

Digitized by Google

and will not be binding on said company until so approved."

This contract or order was made in duplicate, one duplicate being sent to the manufacturers at Detroit, and, as has been stated, the truck was shipped from Detroit and delivered to the plaintiff at Traverse City, Mich. The contract or order referred to describes the truck which was to be sold without mentioning whether it is a new or old truck, but the price stated is the price of a new truck and is not the price at which the particular truck was to be sold. The plaintiff testified that Mr. Joynt, representing the defendant, having requested the plaintiff to call and see him, said:

"That he had been to Detroit to the company, and that they had a truck down there that had been used at the factory as a demonstrating car, and later on he said it was a pick-up-car, that they could make me a price on that that would suit me all right, somewhere in the neighborhood of $1,150 or more. That it would be as good as a new truck in every respect except what wear there had been on the tires, and that they would stand up the same as a new car, and they guaranteed to give me satisfaction, and that they would take care of it in case anything went wrong, the same as they would their new cars, and I told Mr. Joynt that I knowed nothing about the car whatever, but if they would guarantee it, and the company would stand back of that guaranty, too, that I didn't feel that I was taking any chances in that case and would buy, and I gave him an order for the car."

He further testified that the written order referred to was the only order he ever gave for the truck. The plaintiff further testified:

"I have stated in substance my talk with Mr. Joynt in regard to the purchase of this truck. He described the truck to me. He said that it was a truck that had been slightly used at the factory as a demonstrating car, and later he mentioned a pick-up, and that the car was in every respect as good as new, that it had been

Digitized by Google

put through the factory, recalipered, remachined, and that everything was in good condition, and that they would guarantee it the same as a new car, and—well, I think that's all the guaranty that was put on it. They told me to bring it back to them if it proved in any way defective."

Plaintiff further testified that the defendant gave him a book, telling him that he would find the guaranty in there; that he turned over to it in the book. "He said that was the warranty under which this machine was delivered to me." The warranty so called to his attention is not materially different from the one printed on the other sheet of the contract, and reads:

"We warrant the new motor trucks manufactured by us to be free from defects in material and workmanship; this warranty being limited to making good, at our factory, any part or parts thereof which shall, within one year after delivery of the truck to the original purchaser, be returned to us with transportation charges prepaid, and which our examination shall disclose to have been thus defective.

"This warranty shall not apply to any truck which shall have been repaired or altered outside of our factory in any way, so as, in our judgment, to affect its stability or reliability, nor to any truck which has been operated at a speed exceeding the factory rated speed, or loaded beyond the factory rated load capacity, or which has been the subject of other misuse, negligence or accident.

"We make no warranty whatever in respect to tires, rims, chains, ignition apparatus, lamps, gas tanks, signaling devices, generators, batteries or other trade accessories, inasmuch as they are usually warranted separately by their respective manufacturers.

"The foregoing obligation to make good any defective parts returned as herein provided is in lieu of all other warranties, expressed or implied, and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our trucks."

Digitized by Google

Plaintiff testified that, if the truck had been as it was represented to be, it was worth $1,150, and it appears that, after the plaintiff had had the truck for some time and had made various complaints about it, the defendant offered to allow him $1,000 for it as a part of the purchase price of a new truck. There was testimony tending to prove that there is no market value or price for second-hand trucks. Plaintiff had never operated a gasoline car, and he made various complaints about it, and the defendant undertook to and did, as he complained, examine the truck or have it examined and remedied, or have remedied such infirmities in its operation as plaintiff called attention to. In new parts alone, nearly $200 was spent upon the truck, without cost to plaintiff.

At the close of plaintiff's testimony, the defendant moved for a peremptory instruction, as follows:

"That the court now order that, in this case, the plaintiff be limited in his right of recovery, if any, to a breach of the written or printed warranty annexed to this order that has been introduced in evidence, and the same thing as set out in the catalogue that the plaintiff introduced; the first one being Exhibit A, and the other one Exhibit B.

"That, under the testimony in this case, the only part of that warranty that would be available here would be in regard to defective material and workmanship; and it would be the duty of the plaintiff, if he claimed any such defect, to produce the parts and call the attention of the vendor to the same and request that they be replaced or made good, remedied; and that the plaintiff shall be limited to that warranty; and that there is no other warranty upon which he can recover.

"We ask, *second*, that the court direct a verdict in this case of no cause of action, for the reason that the plaintiff has not shown any right of action here, thus far; that there has been no defect or default shown or proven, that would in any way violate the written guaranty, or printed guaranty, or render the defendant liable under the same.

Digitized by Google

"(3) That there is no right of action shown here against the defendant, because, if there was any bargain made, it was simply that the defendant company, the Traverse City Iron Works, acted as agent of the Federal Motor Truck Company, and Mr. Lardie knew that, and says he understood it when he bought the machine."

This was refused. The defendant then introduced testimony tending to prove that except that it was a used truck the truck when it was delivered on board cars in Detroit was in good condition, had been examined, recalipered, remachined, and in every respect put in good and workable condition, that the governor was sealed, that it was sealed when it arrived at Traverse City, that the seal was not broken by the defendant or its agent, and that the truck in fact when last inspected and run by the defendant or any of its agents was in good condition and performed, when operated by a competent person, the service required of it. Defendant renewed the motion made at the close of plaintiff's testimony, and it was again refused. The court submitted to the jury as a question of fact whether there was any special warranty such as is relied upon by the plaintiff in the declaration, saying to them that if all the warranty there was was that one printed on the back of the order and in the little book, and that that had been fulfilled—not breached—then the verdict should be for the defendant. He also charged the jury:

"If you should determine, from the testimony in the case, bearing upon that proposition, that the defendants were obligated by the warranty entered into between the parties, simply to remedy such defects as should be brought to its attention, and further find that the defendant has remedied all such defects that have been brought to its attention by Mr. Lardie, then your verdict in that case will be, No cause of action."

The court instructed the jury further:

Digitized by Google

"It is claimed by the plaintiff, Lardie, and his action in the case is based on the claim, that, at the time of the making of the contract for the sale and purchase of said truck, the defendant entered into a contract of warranty with the plaintiff, whereby said defendant promised and warranted that the said truck should be and was practically as good as new, except the tires, that it had been thoroughly overhauled and remachined and was in perfect condition, that it would develop 28 horse power, make 14 miles an hour and carry a ton over such roads as the plaintiff had to travel in going to and from Old Mission to Traverse City."

Upon the subject of damages the jury was instructed that the rule for determining the amount of damages was the difference between the actual value of the auto truck at the time of its delivery to the plaintiff for the purpose for which it was bought and used and the amount paid for it by Mr. Lardie at the time of the purchase, in determining which they would take into consideration all the evidence in the case.

The court was requested by defendant to instruct the jury:

"I. You are instructed that the order signed by Mr. Lardie was directed to the Federal Motor Truck Company, and that Mr. Lardie should not recover against the Traverse City Iron Works, and your verdict must be, no cause of action, for that reason.

"II. You are instructed that all the defendant was obliged to do was to remedy such defects as Mr. Lardie brought to its attention. That is, when Mr. Lardie found any defects, it was his duty to report the same to Traverse City Iron Works, and allow them to correct same. If you find the Traverse City Iron Works had remedied such defects and replaced such parts as it has been asked to do by Mr. Lardie, then it has done its full duty, and your verdict should be, no cause of action.

"III. I instruct you that the only warranty that you can consider is the written warranty as attached to the original order as set forth in this catalogue which Mr. Lardie has put in evidence.

Digitized by Google

"IV. If you find the written warranty has been fairly and reasonably fulfilled by the Traverse City Iron Works, then your verdict must be, no cause of action.

"V. I instruct you, there is no proof in this case upon which to base a judgment for damages. There is no proof of the value of the truck in question, except the purchase price at the time Mr. Lardie bought it, and you cannot find this truck to be worth less than such purchase price."

The jury returned a verdict in favor of the plaintiff for $500, and judgment was entered on the verdict. Defendant moved for a new trial, which was denied.

OSTRANDER, J. (*after stating the facts*). In my opinion, the testimony of the plaintiff, fairly interpreted, means no more than that the truck was sold with the warranty which was given by the manufacturer upon the sale of a new truck. It is also improbable that defendant gave, upon the sale of a second-hand truck, a warranty broader than the manufacturer and vendor gave upon the sale of a new truck. There were certain representations made by defendant respecting the condition of the truck, as a second-hand, used vehicle. But the guaranty, or warranty, which defendant gave, or made, was the identical warranty of the manufacturer, made known to and understood by the plaintiff. The order was accepted by the manufacturer by delivery of the truck upon the order which plaintiff made. The principal contract was between the manufacturer—vendor—and the plaintiff, and was fully executed. Assuming that a consideration moved to defendant for the additional parol warranty, there is no testimony tending to prove that it was other than the printed warranty of the manufacturer or that there had been a breach of it. The jury should have been instructed that defendant's parol warranty was identical with the printed warranty, and that no breach of it had

Digitized by Google

been made out. This view of the matter requires a reversal of the judgment and, if plaintiff is so advised, a new trial. Other questions debated by counsel are not likely to arise upon a new trial, although it may be pointed out that it is doubtful if any evidence of the value of the truck supports the verdict.

Judgment reversed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

WEINGARDEN *v.* FOLLY THEATRE CO.

1. CONTRACTS—PARTIES—NOVATION—BAILMENT.

Testimony to the effect that plaintiff rented a quantity of theatrical costumes to the defendant, which transferred its assets and business to another company, incorporated for the purpose of conducting such theatrical business as defendant had carried on, that the managers of the two companies were the same, that plaintiff continued providing the rented costumes and defendant paid part of the rental, sending a check for the last amount subsequently to the change, signed by the manager of both corporations, but ceased to pay for rentals accruing after the transfer of its assets, contending that the later concern owed the debt, was insufficient as a matter of law to estop plaintiff from recovering against the original debtor on the theory that a novation had been effected.

2. SAME—CHANGE OF PARTIES—NOTICE.

And although defendant claimed plaintiff had been notified in conversations and by written communications that the defendant had made the transfer to the second corporation, the notice alone did not shift the contract obligation

Digitized by Google

to the other company unless plaintiff expressly or impliedly consented to accept a new debtor in the stead of the defendant.

Error to Wayne; Hally, J. Submitted October 12, 1915. (Docket No. 44.) Decided December 21, 1915.

Assumpsit in justice's court by Israel Weingarden against the Folly Theatre Company for a balance claimed to be due for rental of theatrical equipment. From a judgment for plaintiff defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Welsh, Crane & Kahn, for appellant.

George W. Bates, for appellee.

BIRD, J. The defendant was incorporated in October, 1912, to operate the Folly Theatre in Detroit. When it began operations it also operated a theatrical company. The costumes for the use of the theatrical company were furnished by plaintiff, who was engaged in the city of Chicago, in the business of renting theatrical costumes. Mr. Hugh Shutt was manager of the Folly Theatre, and the costumes were addressed and shipped to him, either personally in care of the Folly Theatre, or to him as manager of the Folly Theatre. The rentals were paid for by checks of the company. Matters ran along this way until December, 1912, when the Central Circuit Company was incorporated to operate theatrical companies in the Folly Theatre and elsewhere. Its principal officers were the same as those of the Folly Theatre Company. This company took over the theatrical company which had been operated by the defendant. The plaintiff continued to ship the costumes to the same address, and they were paid for in part by the checks of the Folly Theatre Company, until April 1, 1913. The rentals which ac-

Digitized by Google

crued between April 1, and June 22, 1913, being unpaid, plaintiff brought this suit to recover therefor. The defense was that the debt was not owing by defendant, but by the Central Circuit Company; that the plaintiff had notice that the Central Circuit Company had taken over in December, 1912, the theatrical company formerly operated by the defendant, and was itself operating it and using the costumes, and that by reason of such knowledge, plaintiff was estopped from claiming that the defendant was indebted for the rentals. The trial court was of the opinion that the evidence bearing upon this contention was in conflict, and therefore submitted the question of defendant's liability to the jury. They found a verdict for the plaintiff in the full amount of his claim.

1. The real question to be determined was whether the plaintiff impliedly extended credit to the Central Circuit Company, and accepted it as his debtor. The defendant insists that the evidence made it a question of law. The plaintiff contends that the testimony was in conflict, and was therefore a question of fact. Defendant relies upon conversations and letters which passed between the parties, to establish his contention. The letter most relied upon is the following:

"C. W. HARRAH, Pres. CHAS. LONSBY, Sec.-Treas.
"HUGH SHUTT, Mgr.
"FOLLY THEATRE COMPANY, Inc.
"HOME OFFICE, FOLLY THEATRE BUILDING.
"DETROIT, MICHIGAN, Jan. 24, 1913.

"MR. I. M. WEINGARDEN,
"414 South State Street,
"Chicago, Ill.

"*Dear Sir:*

"Your letter of the 23d received, and I thank you for the quick action on sending the dancer out. I am inclosing $4.00 in this letter for the transportation, and will have the company send you a cheque for the other bill just as soon as they can raise a little cash. You see that there is only a few interested in the Central

Digitized by Google

Circuit. This is the company that runs the show, and it has been losing every place except here, they are now down in Indiana, and as soon as they can get a little money I will see that it is sent to you. The theatre is doing well of course under the present arrangements, but the Circuit Co. is a little behind but possibly next week will be in shape to pay you up, I will see that you get some of it any way just as soon as any money comes in.

"With best wishes I remain, yours very truly,

"HUGH SHUTT."

The conversations in which Mr. Shutt claims he advised plaintiff of the change in the management of the theatrical company are denied by plaintiff. The foregoing letter, when read in the light of the other facts, appears to be conclusive only of the fact that the Central Circuit Company had taken over the theatrical company, and was then operating it. Notice of this fact would not necessarily shift the contract obligation of defendant to the Central Circuit Company, nor would it necessarily follow that because defendant had turned over the theatrical company to the Central Circuit Company, it would refuse to carry out its own contract with plaintiff. And had plaintiff received the impression from the letter which it is contended he ought to have received, that impression would have been dissipated in part by subsequently receiving defendant's checks in payment of the rentals. Plaintiff testified that he had never dealt with the Central Circuit Company, and it is not claimed that any express agreement was made, whereby plaintiff should deal with it and accept it as his debtor. It is not unlikely that the failure of plaintiff to fully appreciate the situation from the information received was due to the fact that Mr. Hugh Shutt was manager of both companies, as it did not clearly appear when Mr. Shutt was talking or writing as manager of the Folly Theatre Company, and when he was talking or writing as manager of the Central

Digitized by Google

Circuit Company. But whatever the cause of the misunderstanding was, there was a question of fact involved, and the trial court very properly submitted it to the jury.

2. Defendant argues that, when plaintiff was advised by Mr. Shutt that the Central Circuit Company had taken over the theatrical company, and was then operating it, the same rule of law should apply as is applied when the creditor extends credit to a copartnership with knowledge that a certain member of the firm has retired. In such case, if the retiring partner could not be held liable for the debt, the defendant in this case ought not to be so held. The analogy fails for the reason that whether the creditor had notice or not of the retirement of the partner, the debt is all the while against the same firm, and the only question is whether the creditor possessed knowledge of the fact of retirement when the indebtedness was incurred, whereas, in this case it is attempted to substitute one of the contracting parties or debtors for another by bringing notice home to the creditor. The plaintiff made his contract with the Folly Theatre Company, and no other person or corporation could be substituted therefor without his consent. Whether his consent should be inferred from their dealings was the question which the court submitted to the jury, and we think properly so.

The judgment of the trial court is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

Digitized by Google

WEINGARDEN *v.* FOLLY THEATRE CO.

Error to Wayne; Hally, J. Submitted October 12, 1915. (Docket No. 60.) Decided December 21, 1915.

Assumpsit by Israel Weingarden against the Folly Theatre Company for a balance on open account. Judgment for plaintiff. Defendant brings error. Affirmed.

Welsh, Crane & Kahn, for appellant.

George W. Bates, for appellee.

BIRD, J. Plaintiff claims that he furnished theatrical costumes to defendant for a monthly rental from September, 1912, to June 22, 1913. The agreement provided that after a stated time defendant should return them. Some of the costumes furnished were never returned, and this suit was begun to recover their value. The defense made was that in December, 1912, defendant turned over its theatrical company to the Central Circuit Company, a corporation which was formed for the purpose of operating theatrical companies in the Folly Treatre in Detroit, and elsewhere, and that if any costumes were not returned, the Central Circuit Company was liable therefor, and not defendant. The plaintiff had judgment. The question of the liability of defendant in this case turns upon the same state of facts as were discussed and passed upon in *Weingarden* v. *Theatre Co., ante,* 220 (155 N. W. 501), filed herewith, and is ruled by that case.

The judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

Digitized by Google

MERRIMAN *v.* VANDEMARK.

FRAUDULENT CONVEYANCES — CANCELLATION OF INSTRUMENTS — DEEDS—CONTRACTS—ESTATES OF DECEDENTS.

In a suit to cancel a deed made by an intestate, who had arranged with his housekeeper to reward her care and services by devising to her his real estate, consisting of village property worth $2,000 or upwards, but who conveyed the realty to defendant before his death, conflicting testimony reviewed, and *held*, to warrant the decree of the lower court for the complainant administrator; also that notice to defendant of the rights and claim of the claimant (who had secured the allowance of her claim before the probate judge) was established by proof of defendant's admissions.

Appeal from Eaton; Smith, J. Submitted October 11, 1915. (Docket No. 34.) Decided December 21, 1915.

Bill by David P. Merriman, administrator of the estate of Lewis Brooks, deceased, against Stewart O. Vandemark to set aside a conveyance, executed in the lifetime of decedent, for the benefit of a judgment creditor of the estate. From a decree for complainant, defendant appeals. Affirmed.

Hatch, McAllister & Raymond, for complainant.

W. W. Wicker (*R. R. McPeek,* of counsel), for defendant.

MOORE, J. This bill of complaint was filed for the purpose of setting aside a certain deed given by Lewis Brooks to defendant, his nephew, May 16, 1906. The deed was placed on record on June 5, 1906. The bill avers, in substance, that on June 2, 1906, Lewis Brooks

Digitized by Google

died intestate, and that complainant was appointed administrator; that the sole assets of said estate consisted of the real estate in the village of Vermontville, which is the subject of controversy in this case; that at a hearing on claims the probate court allowed Helen Hammond for services rendered as housekeeper, and services rendered in caring for Lewis Brooks and his wife from 1890 until his death, the sum of $2,000; that no claims have ever been paid; that there are no personal assets in the hands of the administrator; that on May 16, 1906, Lewis Brooks executed a warranty deed to the defendant of the land in question; that said deed was not placed on record until after the death of Lewis Brooks; that said conveyance was fraudulent and void as to the creditors of Lewis Brooks; that the claim of Helen Hammond was based on a contract with Mr. Brooks whereby he agreed to will said real estate to her as compensation for her services as housekeeper and services rendered in caring for Lewis Brooks and his wife from 1890 until his death, and that the said claim accrued long prior to the making or delivery of the deed aforesaid; that there is a deficiency of assets in said estate; and that the administrator has no way of paying the claim allowed, unless the real estate described in the bill of complaint is subjected to the payment of said claim. The bill of complaint prays that the said defendant pay a sum sufficient to pay the claim aforesaid and the expenses of administering the estate, and in event of the failure of defendant to pay the debts of said estate that the deed be set aside and the premises sold to pay debts.

The substance of the answer is that the allowance of the claim of Helen Hammond against the estate of Lewis Brooks was fraudulent; that Lewis Brooks was not the owner of the lands at the time of his death; admits the giving and recording of the deed as alleged; denies that the deed was not based upon actual con-

Digitized by Google

sideration, and alleges the deed was given for a full consideration; denies any contract between Lewis Brooks and Helen Hammond as alleged; denies the deficiency of assets in the estate and alleges that Lewis Brooks at the time of his death owned a large amount of personal property which came into the possession of Helen Hammond sufficient to pay all his debts; alleges that the proceedings in probate court in Gratiot county were taken through conspiracy between complainant and Helen Hammond to establish a false claim against the estate of Lewis Brooks, and that for eight years prior to 1906 Lewis Brooks did not reside in Vermontville, and had not been cared for and no services of any kind had been rendered him by Helen Hammond; that, on the contrary, prior to 1898 Lewis Brooks had supported Helen Hammond; that in 1898 Mr. Brooks left Vermontville, and continued to reside in Detroit until 1904; that when he left Vermontville in 1898 Helen Hammond remained on the premises, and had the enjoyment of the same and the household furniture and appliances up to the time of the commencement of this suit, without paying of rent; and that she continues to reside on the premises without payment of any consideration, excepting insurance premiums and taxes. The answer further alleges that, if any services were rendered, any claim therefor is barred by the statute of limitations.

Proofs were taken in open court, and a decree in favor of complainant was rendered. From this decree, the case is brought here by appeal.

The trial judge filed an elaborate opinion from which we quote:

"The claim that the property conveyed to defendant was a homestead is without merit. If there is anything in the position that one may convey a homestead, with death near at hand, in violation of a promise before made to another to convey or devise the same, it

Digitized by Google

cannot apply to this case, for the reason that defendant had not occupied the premises for more than two years, and, if the claim of defendant is sustained, it was for more than eight years.

"Taking up the case as it appears to the court from the proof, it is my judgment that the complainant has established by a fair preponderance of the evidence the following:

"*First.* In February, 1890, the family of Lewis Brooks lived on the premises in contention, and consisted of the following named persons: Lewis Brooks, aged 78, quite infirm, nearly blind, and very deaf; Mrs. Brooks, his wife, aged 80, very helpless from old age and bodily infirmities; Mr. Brown, the brother of Mrs. Brooks, aged 85, in good health for a man of his age but very deaf. Mr. Brooks was desirous to get some one to care for them. Helen Hammond was a niece of Mrs. Brooks. She lived in Vermontville with her husband and family on a small place. She was about 50 years old, in good health, a good housekeeper, and at times did service as a practical nurse. Mr. Hammond was a laborer working his own premises and other lands. The Hammonds left their home and moved on to these premises. At that time Mr. Brooks had the property in question, consisting of the home and about seven acres of land, and a mortgage taken on a farm in Jackson county, which he had sold, and which mortgage was for $3,300, bearing interest at 6 per cent. The arrangement first made was that Mrs. Hammond was to live on the premises, and was to be paid $4 a week for her care of the family. Mr. Hammond was to work the land on shares, having two-thirds, and giving Mr. Brooks one-third. A few months later Mr. Brooks, not making collection of interest when due on his mortgage, made another arrangement by which Mrs. Hammond was to stay there and care for them as long as they lived, and was then to have the place either by a deed of conveyance or by will.

"*Second.* Mr. Brooks lived there continuously until 1898, but after that and until 1904 he stayed part of the time during the winter season with the defendant, Mr. Vandemark, in the city of Detroit. Mr. Vandemark's mother and Mr. Brooks were brother and sister.

"*Fourth.* That defendant claims that Mr. Brooks did not live in the Vermontville home after 1898, but

Digitized by Google

occasionally visited there. The complainant's claim is that Mr. Brooks lived at his home in Vermontville until 1904, making visits in the winter at the home of Mr. Vandemark in Detroit. I am satisfied that the complainant's claim has been established by the greater weight of the evidence, and that this home was his home a greater part of the time until the year 1904.

"*Fifth.* In the year 1904, without any fault of Mrs. Hammond, he moved to Alma, in Gratiot county, this State, into a home with his sister, Mrs. Vandemark, and his niece, Mrs. St. John, who is a sister of the defendant.

"*Sixth.* In the year 1899 Lewis Brooks made his will, and this will was in conformity with his agreement with Mrs. Hammond. This will remained in the custody of Mr. Benedict, who drafted it, until the year 1904, when Mr. Brooks, just before removing to Alma, called and got it, and took it away with him.

"*Seventh.* The fact that Mr. Brooks made the contract in question with Mrs. Hammond is beyond doubt. It is established by proof that cannot be doubted. * * *

"*Eighth.* It is beyond question that Mrs. Hammond carried out her agreement to the letter; that she cared for these old people in the best possible way, and well earned all she could get under said contract. * * *

"*Tenth.* May 16, 1906, the deed in question was made by Lewis Brooks to the defendant at Alma, Mich. Mr. Brooks at this time was of the age of 94 years.

"*Eleventh.* Mr. Brooks died at Alma June 2, 1906, and his body was brought to the old home in Vermontville for burial, accompanied by the defendant.

"*Twelfth.* The deed was placed on record June 5, 1906, the day of Mr. Brooks' funeral.

"*Thirteenth.* December 6, 1911, complainant was appointed administrator of the estate of Lewis Brooks by the probate court of Gratiot county, in this State, filed his bond, and received his letters of administration.

"*Fourteenth.* After that Helen Hammond filed her claim against said estate, which claim as filed was as follows: * * *

"*Fifteenth.* On December 2, 1912, the claim was heard by the judge of probate of said Gratiot county

Digitized by Google

and allowed at the sum of $2,000. The finding of the court is as follows:

"'The evidence before the court shows that the above services were rendered to and in behalf of said deceased during his lifetime, under a contract or understanding that the said deceased should will certain property in the village of Vermontville, Eaton county, Mich., and occupied as a home by the said deceased during the years in which the said services were rendered, except the last two years or more just prior to his death, and that no provisions were made for the said claimant in settlement for her services. The evidence also shows that the value of the services were much in excess of the property in question which the evidence showed to be worth $2,000, which sum the court has allowed said claimant, and that the said deceased died possessed of no other property only that in question and above referred to.' * * *

"*Seventeenth.* Mrs. Hammond has been in possession of said property since 1890, and is now in possession of it, and has during that time cared for it, paid the taxes on it, and kept it in repair.

"*Eighteenth.* The defendant made no claim to the premises until June, 1913, when he caused to be served on Mrs. Hammond a notice to quit possession of the premises.

"While I am without doubt as to the proper disposition of this case from the proof, yet I am of the opinion that, could the truth be known as to the disappearance of the will, and the disposition of the money belonging to Mr. Brooks, on account of the mortgage, it would materially strengthen the claim of the complainant in this case, as set forth in the bill of complaint. It is my judgment that complainant has established a legal fraud against the defendant in the giving and taking of this deed, and has established his right to the relief he asks for, and that he should be given a decree as prayed."

The bill of complaint in this cause is filed under 4 How. Stat. (2d Ed.) § 11074 (3 Comp. Laws, § 9363). This statute has been construed by this court in a number of cases. See *Walker* v. *Cady*, 106 Mich. 21 (63 N. W. 1005); *Beith* v. *Porter*, 119 Mich. 365 (78 N. W. 336, 75 Am. St. Rep. 402).

Digitized by Google

The important questions in the case are questions of fact. Dr. Snell testified to a conversation with defendant that shows the defendant knew about the arrangement between Mrs. Hammond and Mr. Brooks long before he took the deed, and, though defendant was a witness, he did not deny this conversation.

There was contradictory testimony. It would profit no one to quote the testimony. We shall content ourselves with saying that, after a careful examination of the record, we are satisfied with the decree of the court below.

The decree is affirmed, with costs.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

ALPERT *v.* PLOTKIN.

EVIDENCE—BILLS AND NOTES—ACCOMMODATION.

Where plaintiff brought suit on a promissory note that defendant charged had been executed for the accommodation of the plaintiff, who, on his part, claimed that the note was given him for professional services as an attorney, the question at issue was one of fact, upon irreconcilable testimony; the trial court erred in directing a verdict for plaintiff.

Error to Wayne; Collingwood, J., presiding. Submitted October 14, 1915. (Docket No. 100.) Decided December 21, 1915.

Digitized by Google

Assumpsit by Daniel J. Alpert against Samuel Plotkin on a note. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

Beckenstein & Wienner, for appellant.

Alpert & Alpert, for appellee.

MOORE, J. Plaintiff is an attorney. This action is based on a promissory note dated March 4, 1914, for $250. Plaintiff claimed and gave testimony to the effect that the note sued was one of two notes the defendant executed, and that the consideration of the two notes was professional services. Plaintiff gave further testimony to the effect that defendant executed another note to contractors, which note he purchased. Defendant claimed that he executed two notes for services, and also another note some time in March, 1914, for plaintiff's accommodation, to enable plaintiff to discount it at a bank, the plaintiff promising to meet payment of the note when it became due. Defendant further testified the note involved in the present suit was the accommodation note, as the other two promissory notes were involved in the two suits before the justices of the peace, and judgments rendered thereon. The record discloses the following:

"Q. These notes you never paid any one, did you?
"A. I gave you two notes—
"Q. Did you pay anybody this note?
"A. This note of March 4th?
"Q. This note given for my services. I rendered services for you, didn't I, for which you gave me this note?
"A. I gave you two notes for services.
"Q. These are the two notes you gave me for services?
"A. Yes.
"Q. You did not pay either one of them yet?
"A. No. (Defendant rests.)

Digitized by Google

"*Mr. Alpert:* We now ask you honor to direct a verdict in favor of the plaintiff against the defendant because he admits that the note on which we are suing has not been paid, and he admits that neither one of these notes have been paid, and both notes given on March 4th were given for services.

"*Mr. Beckenstein:* He testified that two notes were signed for personal services and one note for an accommodation, and the one you were suing on is for accommodation, and the question for the jury is whether this would be the accommodation note.

"*The Court:* His last testimony was that he gave two notes on March 4th for services, and one has been paid by judgment, and this note remains and nothing has been paid on it. I will direct a judgment for the plaintiff."

A verdict and judgment was rendered for $253.87. The case is brought here by writ of error.

Previous to his cross-examination defendant testified that the note sued upon was an accommodation note which plaintiff was to pay when it matured. He also testified that the two notes given for professional services were sued and put in judgment. We quote:

"*Q.* Did he say when the money became due he would take care of it?

"*A.* He would pay it.

"*Q.* And the only notes that you signed for which you owe money were the two notes?

"*A.* The two notes.

"*Q.* You were beaten on the other two notes?

"*A.* On these notes.

"*Q.* Did you sign a bond to stay execution on those notes?

"*A.* Yes.

"*Q.* When the time is up will you pay?

"*A.* Yes, I would pay them right away, but it made me mad, you know, and that's why.

"*Q.* And the note which is in this suit was signed for the purpose of enabling him to get the money out of the bank?

"*A.* Yes, for his own use.

Digitized by Google

"Q. You received no cent of it.
"A. No."

The record also shows a judgment before Justice Richter on a note for personal services in the sum of $251.96 and costs, and a judgment before Justice Degaw on a promissory note for services for $253.96 and costs. We think it clear this testimony raised a question of fact for the jury.

Judgment is reversed, and a new trial ordered.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

SIKORA v. FELLOWCRAFT CLUB.

1. NEGLIGENCE—ELEVATORS—LICENSEES—LANDLORD AND TENANT. Where the proprietor of a building leased to defendant club the upper stories, together with a power freight elevator, for ten years, and the defendant club undertook the expense of operating and repairing the elevator, the proprietor reserving the privilege of using the elevator, to himself and other tenants, in so far as their use did not interfere or conflict with the requirements of the club, and agreed to pay a just proportion of the expenses thereof, where, also, the landlord granted to the club the use of part of the basement, at a subsequent time, to pay his part of the expenses of maintaining the elevator, the landlord was not responsible for the negligent killing of plaintiff's intestate, who was delivering beer for defendant club, whose servant operated the elevator at the time of the ac-

Digitized by Google

cident; and upon proofs showing that the elevator was delivered to the defendant club in good condition.[1]

2. SAME—MASTER AND SERVANT—PERSONAL INJURIES.

But the servant in control of the elevator, being employed by the club, which maintained the apparatus, was chargeable with neglect for starting it just as decedent attempted to enter, and for his negligence the club was responsible, under the rule of *respondeat superior*.

3. SAME—EVIDENCE—RES GESTÆ—HEARSAY RULE—EXCEPTION—ELEVATOR.

Testimony to the effect that decedent's superior, having charge of the delivery of beer, told deceased to remain with the horse and directed the operator to start the elevator, was admissible as part of the *res gestæ*, and it was error to exclude it.

4. SAME—REPAIRS—DEGREE OF CARE—DEFECTIVE APPLIANCES—CHARGE.

Held, that it was erroneous to instruct the jury that the defendants were under obligation to maintain the elevator gate in repair, when the issue should have been limited to the simple question whether the person directing decedent had notified him to remain with the horse and whether the elevator started as decedent entered or was already in motion.

5. SAME—CONTRIBUTORY NEGLIGENCE.

And it was improper to charge the jury that defendants owed towards the intestate a high degree of care, or to inform them that the latter was not required to stop, listen, or specially examine the elevator before entering.

Error to Wayne; Barton, J., presiding. Submitted October 13, 1915. (Docket No. 78.) Decided December 21, 1915.

Case by Frances Sikora, as administratrix of the estate of Adam Sikora, against the Fellowcraft Club and others for the unlawful killing of plaintiff's decedent. Judgment for plaintiff. Defendants bring error. Reversed.

[1] On liability of landlord to third person for condition of premises in possession of tenant, see notes in 26 L. R. A. 197, 50 L. R. A. (N. S) 286.

Digitized by Google

Chamberlain, Denby, Webster & Kennedy, for appellants executors of Palmer Estate.

Clark, Lockwood, Bryant & Klein, for appellant Fellowcraft Club.

Samuel G. Thompson, Harry W. Cullen, and *Cullen, Casgrain & Wurzer*, for appellee.

MOORE, J. This case is brought to recover damages for injuries resulting in the death of Adam Sikora because of the alleged negligence of the defendants.

Thomas W. Palmer was the owner of a large building on Washington boulevard in Detroit. The building had a basement, and was six stories high above the basement. The first story has five stores; the second and third floors are used as offices. The building was completed the latter part of 1910. The lease from Mr. Palmer to the Fellowcraft Club is dated October 1, 1910, and it leases the three upper floors of the building—

"together with a first class electric passenger elevator and a proper power freight elevator, with access to said elevators and the stairways leading to said upper three floors through the main halls in said building for the term of ten years.

In this case it is provided that:

"it [the Fellowcraft Club] will also pay the expense of operating and keeping in repair the said passenger elevator and said power freight elevator installed in said building by the party of the first part for the use of said party of the second part, and demised hereby.
* * *

"It is further mutually understood and agreed by and between the parties hereto that the said party of the first part shall have the right and privilege, for himself and his tenants in said building of which the premises hereby demised form a part, to use the said power freight elevator furnished for the use of said party of the second part and hereby demised, provided always that such use shall not conflict or interfere with

Digitized by Google

the enjoyment of the same by the said party of the second part for its uses and purposes, and provided also that said party of the first part shall pay to said party of the second part for such use of said elevator had by himself and tenants such proportion of the monthly expense of the operation and repair of the same and of insurance against accidents in operation thereof, as shall hereafter be found equitable upon the basis of the relative use of the same made by the said party of the first part and his tenants."

In January, 1911, an agreement was made, whereby Mr. Palmer gave the club the use of a certain portion of the basement as payment of his proportion of the expense of operating the freight elevator, keeping it in repair and insuring it against accident. When the Fellowcraft Club took possession the freight elevator and its appliances were inspected. They were of approved type and in common use and were in good working order.

The Fellowcraft Club is a social club. The freight elevator has been operated exclusively by the employees of the Fellowcraft Club. At times freight was carried on this elevator to the second and third floors of the building for the tenants occupying those floors. On July 29, 1913, this elevator was operated by Ernest Law, an employee of the Fellowcraft Club. At the time of the accident the elevator was being used to take two half kegs of beer from the alley entrance to the Fellowcraft Club. The opening in the east wall of the elevator shaft at the alley level was five feet wide and seven feet high. There was a metallic fire door on the outside of this opening which rolled up like a curtain. In this opening there was a semi-automatic gate. When the elevator is brought to the level of the opening on the alley the operator lifts the gate and a dog holds it from falling. If the elevator is raised or lowered six to twelve inches this dog is released and the gate falls, closing the opening.

Digitized by Google

On July 29, 1913, the plaintiff's intestate was employed by the Stroh Brewing Company. He was sent out as a helper with Frank Kottlefski, a driver of a one-horse truck used for delivering beer, the vehicle, horse, and beer belonging to the Stroh Brewing Company. The plaintiff produced two men who claimed to have seen the accident. One of them testified:

"When I came out into the alley I saw a beer wagon and a man in the alley. I saw a man directly in front of him, and a man up by the beer wagon. * * * There was a man directly in front of me, about eight to ten feet. Then I noticed another man up by the brewery wagon, who seemed to be covering up the wagon. He finished that, and then went towards the elevator entrance in the Palmer Building. I saw him step his right foot upon the elevator. The elevator started up immediately, and I stopped to see what happened. He slipped—it caused me to stop, and he fell face forward with his hands out on the elevator platform. His legs were hanging over the edge of the elevator. The elevator was standing still when I first saw him step on the elevator platform. I didn't then see any gate. I saw the man go up on the elevator in that position. When the elevator started up, and I saw the man in that position, I hesitated to see if he would recover himself, or get up, or get any assistance; but that did not happen, so I saw him going on past the upper opening. I stepped over to the elevator to see what became of him, and I looked up the shaft, and the elevator stopped after it had got above that opening a few inches, and * * * I heard one voice say, 'Let me down! let me down!' that way. They all seemed to be excited, and then I heard another voice, 'Let him down! let him down!' and some one said, 'All right! all right!' Instead of the elevator coming down, it started up again. I heard a crackling sound, as if timber or wood were breaking, then I realized what had happened, and I was heartsick. I stepped back across the alley from the place just on a diagonal across the alley out of the way. When I first noticed the man step on the elevator, I could see just the back of a man and the edge of a beer keg. My range of vision was

Digitized by Google

not so it would permit me to see on the inside of the elevator, but I could see the outer edge of the elevator and the entrance to it.".

The second witness for the plaintiff testified:

"As I came up near the Palmer Building the first thing that caught my sight was a wagon, and I saw a man there at an elevator. I stopped and lit my cigar, and naturally coming on down more, as I lit my cigar, it went out and I stopped again to light it, then started on down. By that time I was within at least ten feet of the elevator entrance. Then I saw a man leave from the elevator and go towards the wagon. The wagon seemed to have beer or something in it, and had a cover. Then I heard a man say, 'Go and cover the wagon John, and come back.' I understood him to say 'John.' That is what I heard him say. By that time I walked on down. I had nothing in particular to do, and I used to walk to work at the Fellowcraft Club, and I stopped to watch them taking it up, and I walks back, and I stopped in front of it just like I am here (indicating) and I saw this man step on the elevator. When he stepped the elevator started up; it was absolutely still until he stepped on it and it started up and caught the man midway of the back. Well, from the position that I was looking at and where I was at, he had one leg doubled up; it seemed that he tried to make it upon there, and then the first stop was it caught him; it seemed to be the middle through the back and stomach, and then I ran up, of course; I was excited to see, so I ran up and I says to this—I run up there, looked at the outfit, and it suspended about a minute, and then the man says, 'Lower me down! lower me down!' He says, 'I am all right now.' Well, then it was there for just about, I reckon, about 30 seconds, or a minute, possibly, before the elevator took another start; then the shriek and the breaking, and then I looked up, thought possibly something had happened; then I heard excited voices talking; then the elevator started down. I heard the timber breaking, and I heard the man shriek. The elevator shot down to the basement. * * * When I first saw Adam Sikora enter this elevator, there was a white man sitting on the

Digitized by Google

right-hand side and a colored fellow was standing over on the left, on the side fronting towards Washington boulevard. I have ridden on this elevator many times. The cable that operates the elevator is on the left-hand side and next to the inner portion of the building. Whatever the operative force is, it is on the left-hand side and towards the inner portion of the building. I saw Adam Sikora step on the elevator while it was standing still. The operator was standing with his face toward the boulevard and his back towards the alley. The other person on the elevator was sitting in the same position, facing in the opposite direction away from the alley."

At the time of the trial the operator of the elevator at the time of the accident was dead.

On the part of the defendant Frank Kottlefski testified in part:

"I am working for Stroh's Brewery. I have worked for them going on two years next June. I was working for them at the time of the accident to Mr. Sikora. * * * Mr. Sikora was employed by Stroh's Brewery. He was only extra man. * * *

"Q. Under whose supervision, whose charge, was Sikora?

"A. I was boss at that time.

"Q. When he was with you?

"A. Yes, sir. * * * I remember the day that Mr. Sikora was injured. * * * On the day in question we were to take some beer from the brewery to the Fellowcraft Club. * * * I was driving what they call a single truck. It was drawn by one horse. I came from Grand river into the alley and up through the alley going north, going toward Clifford street, so when I got up in front of the door I got off the wagon. So did my helper Mr. Sikora. I drove somewhere between two and three feet off from the building. The back end of my wagon came just about even to the door that went into the building. The horse was north of the door. I got off the truck and rang the bell for the elevator to come down. There was a bell right on the side there, just pressed the button in the wall of the building. There was a gate over this opening. It was down

Digitized by Google

from the hole. It was hanging down, so the elevator man came down with the elevator and stopped and shoved the gate up. After he shoved the gate up nobody had to hold it; it stays right up there. After that I took a half barrel of beer off to put it on the elevator, then I took another off and put it on the elevator. Two half barrels I put on. Sikora did not help to handle these half barrels. He was on the other side of the truck, on the east side of the truck. After I put the two half barrels on the elevator, I walked on the elevator, and I told Mr. Sikora— We always called him 'John,' and I says, 'Cover up the beer and watch the horse,' and he says, 'I do so.' And I says to Mr. Sikora, 'On the way coming back I will go right down to the basement, there is some empties and I will bring them up,' and I said, 'Be sure and don't go away from the horse.' He said, 'All right; I will do so.' So I turned around and sat down on the half barrel, and I said, 'Let it go.'

"*Mr. Wurzer:* Just a minute. I move to strike out that last.

"*The Court:* Yes; what he said to the elevator man hardly would be competent.

"*Judge Lockwood:* Here is a man who was looking and talking with the only other man there, and he says 'All right, go ahead!' and the man then starts it. I think that is competent to show that."

The court granted the motion to strike out any statement made by the witness as to what he said to the operator on the elevator. Witness (continuing):

"I saw Mr. Sikora after the elevator started. As the elevator started, just as the elevator started, he was on the east side of the truck, right by the hind wheel covering the beer. After this elevator was started I sat down on a half barrel and turned my face toward the elevator man. The elevator was in motion when I sat down, and the elevator was in motion when I saw Sikora at the hind wheel of the wagon. The next thing I heard or saw, the elevator was going up and I was sitting down, and at once I heard a holler and he said, 'Oh, gee, stop! stop!' and I looked around, and I said, 'Good God, stop quick!' and just as I hollered the 2x4

Digitized by Google

or 4x4, that little gate is hung on—there is a little pulley there, and a rope goes there holds the gate up there—that came out, and at the same time the fellow on the elevator, he turned around and he stopped, but while he stopped he was up between the elevator and the beam already.

"*Q.* Now, will you show to the jury how Mr. Sikora was with reference to the elevator at that time? You can stand up and show, if you want to.

"*A.* He was this way (indicating) on the elevator, laying over like that (indicating). One leg he had down and the other one he had like this here (indicating), lying over like that (indicating).

(The indication made by the witness showed that Sikora was lying upon his face upon the floor of the elevator with the lower part of his body extending out easterly beyond the edge of the elevator.)

"*Q.* Did the colored man stop?

"*A.* Yes; he stopped right there. At the time the elevator stopped the man Sikora was a few inches from the bottom of the beam, between the elevator and the beam. He was pressed between the elevator and the top of the beam.

"*Q.* What happened to the gate as you heard him holler?

"*A.* Well, I just heard the gate crackling, and I know that 2x4—I call it a 2x4—that broke out of one end. That 2x4 was a piece to which the rope was attached that holds the gate up. The gate shoved up against it. The cross-piece where the gate hangs broke.

"*Q.* Now what was the next thing done after the elevator stopped?

"*A.* Well, I hollered to him to lower down.

"*Mr. Wurzer:* Just a minute; I make this same objection.

"*The Court:* Not what you said—what was done.

"*Witness* (continuing): Well, he lowered down the elevator. He lowered it somewhere around two feet, something like that. I got hold of him (Mr. Sikora) around his shoulders like, you know, and by the leg and I twisted him around and put on the elevator, straightened out on the elevator. From the time the elevator stopped it did not start up again. It did not go up any more after it stopped. After I had straight-

Digitized by Google

ened this man out on the floor of the elevator he was taken down in the basement."

There was a long cross-examination of these witnesses, but the testimony quoted is the substance of the testimony of all the witnesses who claim to have seen the accident. Each of the defendants asked for a directed verdict. The judge submitted the case to the jury in a long charge. From a verdict and judgment of $6,000 in favor of the plaintiff the case is brought here by writ of error.

The defendant the Palmer Estate claim a verdict should have been directed in its favor for several reasons, among them:

(*a*) The only negligence disclosed by the testimony, if there be any negligence, is that of the operator of the elevator who was hired by and was under the exclusive control of the defendant the Fellowcraft Club.

(*b*) Because the deceased came to the freight elevator upon the invitation of the defendant the Fellowcraft Club, and not on the invitation of the executors.

(*c*) Because at the time the accident happened the freight elevator was in the exclusive control of the defendant the Fellowcraft Club, and the executors or the tenants of the executors because of its use by the Fellowcraft Club would have no right to use it on their own account.

(*d*) That the executors are not responsible for negligence of a servant or servants of the Fellowcraft Club.

Counsel for the appellee contend that as the elevator might be used to carry freight for all the tenants in the building the landlord was bound to see not only that the elevator was in good repair, but was also obliged to have it operated without negligence, citing *Shoninger Co.* v. *Mann,* 219 Ill. 242 (76 N. E. 354, 3 L. R. A. [N. S.] 1097), and *Sciolaro* v. *Asch,* 198 N. Y. 77 (91 N. E. 263, 32 L. R. A. [N. S.] 945). A reference to these cases will show them distinguishable from the instant case. In the first of them "defend-

Digitized by Google

ant retained the control of the halls, entry, and elevator in the building for the common use of its several tenants." The elevator was in charge of a servant of the defendant. The plaintiff was in the employ of tenants who were entitled to the elevator service.

In the case of *Sciolaro* v. *Asch, supra,* the record shows that plaintiff was in the employ of a firm who occupied the ninth floor of a building under a lease given them by defendant which "with other privileges included steam heat and usage of passenger and freight elevators in common with other tenants in the building." In disposing of the case the court said in part:

"While the lease referred to may not measure or limit the rights of the plaintiff as an employee of the tenant, its covenants relating to the furnishing of elevator service by the appellant tended to establish the duty of the latter in respect of that service. The building was one occupied by a number of tenants, who were to have in common the use of the steam heat and the elevators. As to these things, which were to be furnished by the appellant, he had a general control and a corresponding duty. This control and duty were reciprocal and inseparable. The right to control and manage carried with it the obligation to do so with reasonable care and prudence."

So far as this case is applicable to the case we have before us it does not sustain the contention of the appellee.

In 9 R. C. L. p. 1250, it is said:

"Where the owner of a building leases different floors or rooms to different tenants, but retains the control and management of an elevator in the building, he is responsible for injuries to tenants, their employees and such other persons as may lawfully use the elevator. But if the tenant has the sole control and management of an elevator in a leased building, he, not the landlord, must give warning and look out for the safety of the persons whom he invites to use the elevator."

Digitized by Google

In *Peake* v. *Buell*, 90 Wis. 508 (63 N. W. 1053, 48 Am. St. Rep. 946), appears the following:

"The elevator was operated by the defendant's tenants, and not by him. The defendant owed the deceased no duty in respect to the operation of the elevator. To constitute actionable negligence, the defendant must be guilty of some wrongful act or breach of positive *duty to the plaintiff*. *Griswold* v. *C. & N. W. R. Co.*, 64 Wis. 652 [26 N. W. 101]; *Cole* v. *McKey*, 66 Wis. 510 [29 N. W. 279, 57 Am. Rep. 293]; *Dowd* v. *C., M. & St. P. R. Co.*, 84 Wis. 116 [54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917]; *Goff* v. *C. R. & M. R. Co.*, 86 Wis. 245 [56 N. W. 465]."

There is a discussion of the doctrine of *respondeat superior* in *Hartley* v. *Miller*, 165 Mich. 115 (130 N. W. 336, 33 L. R. A. [N. S.] 81), that is helpful. See, also, *Riley* v. *Roach*, 168 Mich. 294 (134 N. W. 14, 37 L. R. A. [N. S.] 834); *Daugherty* v. *Thomas*, 174 Mich. 371 (140 N. W. 615, 45 L. R. A. [N. S.] 699, Am. & Eng. Ann. Cas. 1915A, 1163); and *Janik* v. *Motor Co.*, 180 Mich. 557 (147 N. W. 510, 52 L. R. A. [N. S.] 294).

In the instant case the condition of the elevator was good at the time it was delivered by the landlord to the Fellowcraft Club. From that time the obligation to keep in repair was upon the Fellowcraft Club. The elevator was in its charge. If the deceased had any right upon the elevator it was because he was helping to deliver the beer to the Fellowcraft Club by means of an elevator that was in its control and operated by its employee. Under these circumstances we think it should be said as a matter of law that the Palmer Estate is not liable, and that a verdict should have been directed in its favor.

The defendant the Fellowcraft Club urges many assignments of error, some relating to rulings upon the admission of testimony, some relating to the refusal to give requests, and some to the charge as given. We

Digitized by Google

think it was not error to refuse to charge there could be no recovery against the Fellowcraft Club. As we have seen, the testimony was in sharp contrast, and presented an issue of fact for the jury.

It is said the court erred in striking out the testimony of Mr. Kottlefski as to what he said to the elevator man just before he started the elevator. In this connection it should be recalled that the deceased was under the direction of this witness, and according to his testimony had nothing to do with placing the half kegs of beer upon the elevator, and was directed by the witness to remain with the horse. The testimony stricken out was not only part of the *res gestæ*, but it bore directly upon the question of whether the elevator man was negligent. He had been called to bring the elevator to the opening that the two kegs of beer might be delivered, presumably he knew Mr. Kottlefski was in charge of that delivery, and when the beer was upon the elevator he heard the direction given to the deceased to remain with the horse, and was then told by Mr. Kottlefski "to let her go." We think it was error to strike out this testimony.

The court was requested to charge there was no testimony that the injury to deceased was caused by a want of repair in the gate or elevator. The court declined to give these requests, and charged the jury at great length upon the duty of each of the defendants to keep the gate and the elevator in repair. We have already quoted the substance of the testimony given by those who claimed to have seen the accident. This testimony made the issue a very simple one. Was the elevator started when the deceased having the right was getting upon it as claimed by the witnesses for the plaintiff, or was he directed by one having the right to direct him to remain with the horse, as claimed on the part of the defense. We think the lengthy charge of the trial judge upon the duty of repair tended to con-

Digitized by Google

fuse the simple issue. See *Hall* v. *Murdock*, 114 Mich. 233 (72 N. W. 150).

The charge was a very long one. In it appeared the following:

"The persons having charge or control of the maintenance and operation of this elevator were bound to use and exercise that care and caution to prevent injury to passengers upon this elevator that an ordinarily prudent person under like circumstances would use, having in mind the nature, kind, character, and construction of the elevator, and the presence or absence of danger under all the surrounding facts and circumstances in this case. This may be said, under the circumstances in this case, to be a high degree of care. * * * The deceased was required to use and exercise such reasonable care as a person of ordinary prudence would exercise under like circumstances for his own safety. But, under ordinary circumstances, an open door at a stationary elevator constitutes an invitation to all persons desiring and entitled to do so, to enter or leave at will, and the plaintiff's intestate, Adam Sikora, had a right to assume if the door or entrance to the elevator was open and the elevator was at a standstill, that he might enter the elevator safely. And under such circumstances the plaintiff's intestate was not charged with the duty of stopping to look, to listen, or to make a special examination."

The use of the words, "This may be said under the circumstances in this case to be a high degree of care," "and under such circumstances the plaintiff's intestate was not charged with the duty of stopping to look, to listen, or to make a special examination," placed too high a duty upon the defendant the Fellowcraft Club, and too little responsibility upon the part of the deceased. The charge also ignored the testimony to the effect that deceased was told to remain with the horse. See *Henson* v. *Beckwith*, 20 R. I. 165 (37 Atl. 702, 38 L. R. A. 716, 78 Am. St. Rep. 847); *Bennett* v. *Butterfield*, 112 Mich. 96 (70 N. W. 410); *Hall* v. *Murdock*, 114 Mich. 233 (72 N. W. 150); *Patterson* v. *Hemen-*

Digitized by Google

way, 148 Mass. 94 (19 N. E. 15, 12 Am. St. Rep. 523).

We do not think it necessary to discuss the other assignments of error, as they are either not well taken, or will not occur again.

Judgment is reversed, and a new trial ordered.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

LERNER v. HARVEY.

1. BROKERS—REAL PROPERTY—SALE—PRINCIPAL AND AGENT—COMPENSATION.

Plaintiff, who was engaged in the business of real estate brokerage, interviewed defendant as to the sale of a certain terrace owned by defendant, who fixed a price of $18,000. Plaintiff stated that he would expect a commission. Defendant asked how much and the reply was three per cent. Defendant said he thought two per cent. was sufficient on so large a transaction. No writing was made. The plaintiff introduced one of his customers to defendant, who declined an offer of $15,000 for the realty, saying that $17,000 was the least he would accept. Defendant claimed that he only agreed to pay the commission if plaintiff secured a price of $18,000 for the property. Over a year later defendant sold the terrace to the said purchaser at $17,000. In defense of an action for the commissions for making the sale, it was urged that the contract had terminated by lapse of time. *Held*, that the conflicting testimony with regard to the terms of the oral contract presented a question of fact and whether or not the plaintiff was the procuring cause of the sale was for the jury.[1]

[1]As to when real estate broker is considered as procuring cause of sale, see note in 44 L. R. A. 321.

Digitized by Google

2. SAME—MODIFICATION OF PRICE—COMMISSION.

The fact that the owner finally sold the property at a price $1,000 less than the agreement called for was not conclusive of defendant's right to a verdict, upon testimony of the plaintiff that he had general authority to secure a customer ready and willing to purchase the property and that defendant fixed the price at $18,000, later reducing it to $17,500 and, finally, to $17,000; if the jury believed plaintiff's version their verdict was warranted.[1]

Error to Wayne; Mandell, J. Submitted October 11, 1915. (Docket No. 6.) Decided December 21, 1915.

Assumpsit in justice's court by Abraham Lerner against Fred C. Harvey for broker's commissions. From a judgment for plaintiff defendant appealed to the circuit court, where plaintiff obtained a judgment. Defendant brings error. Affirmed.

William W. Wicker, for appellant.

John D. Harger, for appellee.

STEERE, J. Plaintiff recovered from defendant in the circuit court of Wayne county a verdict of $340 as commission on the sale of certain real estate. The action was commenced in justice's court, and pleadings were oral. Plaintiff declared in assumpsit on the common counts, and defendant pleaded the general issue. The property sold was a terrace of six houses and the land on which they were located, upon Theodore street in the city of Detroit. It belonged to defendant and was sold to a man named Lieberman for $17,000. Plaintiff's bill of particulars was for a commission of 3 per cent. of that amount. Defendant's most prominent assignments of error relate to refusal of the court to grant his motion for a directed verdict

[1] The effect upon the right to commission of fact that owner sells to brokers' customer at reduced price is discussed in notes in 15 L. R. A. (N. S.) 272, 34 L. R. A. (N. S.) 1050.

Digitized by Google

in his behalf, refusing requests to charge, and the charge as given.

The alleged contract of brokerage, or agency, was oral. The court left it to the jury to determine what contract, if any, was made, and, if there was a mutual understanding between them, what was done under it. The three witnesses in the case are plaintiff, defendant, and the purchaser. The testimony of plaintiff and defendant cannot be reconciled in important particulars, while that of Lieberman, the purchaser, cannot in all respects be reconciled with itself. From the somewhat confusing and conflicting testimony of the witnesses the undisputed facts stand out that defendant offered this property for sale at $18,000, and plaintiff, having some kind of agency or authority to sell or produce a buyer for it, hunted up Lieberman as a prospective purchaser, took him to defendant and introduced him as such, thus bringing the eventual buyer and seller together, and ultimately Lieberman bought the property for $17,000.

It is the contention of defendant that their agreement, so far as any contract for a commission was made, consisted of his answer to plaintiff's solicitation for an opportunity to negotiate a sale, that if plaintiff produced a customer ready and willing to pay the sum of $18,000 in cash for this property he would pay him a commission of 2 per cent.; that all efforts of plaintiff and negotiations upon that basis ended in failure over a year prior to the time when he himself sold the property to Lieberman through new and independent negotiations; that, having failed in performance of his express contract, plaintiff can sustain no claim for compensation under an implied one.

Plaintiff's contention is that defendant proposed and agreed without limit of time that if he produced a purchaser who would buy the property at the price which

Digitized by Google

he then asked or, by inference, any other satisfactory sum, he would pay him a commission; that, acting upon such understanding between them, he found a purchaser and introduced him to defendant, which resulted in a sale of the property at a price satisfactory to defendant; that under the circumstances shown, even though the sale was effected at a lower price than that originally asked, he is entitled to his commission upon the general principle that when a real estate owner has given to a broker authority to sell lands on commission, and himself, without canceling the broker's authority, effects a sale to the party whom the broker has found and brought to him, the commission is earned.

The court submitted the case to the jury with instruction as to the law upon these conflicting theories. Defendant claims the undisputed evidence supports only his theory.

It appears that plaintiff, who testified that he had been in the real estate business about three years, learned in some manner that the property in question was for sale, and who owned it; that some time in July or August, 1912, he went to defendant's office and inquired if it was for sale, telling him that he was working on commission. All that each testified to on direct examination touching an agreement as to a commission, agency, and introduction of the ultimate purchaser (stated in the bill of exceptions in narrative form) is as follows:

Plaintiff testified:

"That he went to Harvey's office in the Moffat Building and asked him if the property was for sale, and Harvey said it was. Harvey asked him how he was working and he replied that he was working on commission. He asked what Harvey would take for the property and Harvey said $18,000. Harvey asked him what commission he asked and he replied 3 per cent. Harvey said that on a big deal he thought 2 per cent.

Digitized by Google

was enough, and witness replied that when a big deal was made the agents liked to get full commission. He showed the property to a Mr. Lieberman, and then took Lieberman to Mr. Harvey's office. He told Mr. Harvey that Mr. Lieberman was a prospective purchaser. Lieberman said the buildings needed a lot of repairs and $18,000 was too much, and Harvey said the best he would take would be $17,000; $5,000 down, and Lieberman said he would give about $3,000 down."

Defendant testified:

"That Mr. Lerner came to his office and asked him if the property was for sale and the price asked. That he told him the price was $18,000 cash. That he asked Lerner if he wanted to buy it and Lerner told him that he did not, that he was a real estate dealer. That he then asked him what commission he asked, and Lerner replied that the usual commission was 3 per cent. That he told Lerner if he would find a purchaser for $18,000 cash he would pay him 2 per cent. commission; that he would not pay 3 per cent. commission on a deal of that kind. That Lerner left the office and within three or four days brought Mr. Lieberman and introduced him. That he had never seen Mr. Lieberman prior to that time. That Lieberman asked the price of the property and he told him $18,000. That Lieberman said he would not pay that much, and he and Lerner left the office."

On cross-examination plaintiff testified that the best offer Lieberman then made was $15,000, which defendant would not accept. Lieberman testified that he first learned of the property through plaintiff who took him to defendant's office and introduced him; that witness said he would think it over and let defendant know, and defendant said he had a man who took care of the property whom he would send down to show witness through there; but the man never showed up and after waiting several weeks he went up to see defendant and so informed him; that defendant then gave him a note to a certain number saying, "You go in and that lady will let you look at the property inside," which he did,

Digitized by Google

and then went down the same week, without plaintiff, "and made Harvey a proposition."

"*Q.* What proposition did you make?

"*A.* I don't remember; I think it was $16,000 or $17,000, and Harvey turned it down; he wanted $17,500, and we finally struck up a deal for $17,000. * * * That he saw Lerner several times after he took him up to Harvey's office; Lerner bothered the life out of him, and he finally told him there was no use bothering him. That Lerner came to him repeatedly and urged him to buy the property. Lerner said he knew several pieces of property and showed him several pieces of other property. Lerner also sold some property for him."

His "finally" was, like other of his statements, somewhat indefinite, but he subsequently stated on cross-examination that they made the "actual bargain" some time in July or August, 1913. His contract to purchase appears to have been signed November 20, 1913. He further testified on cross-examination that he was in defendant's office at the time of closing the deal and had been there about a week or so before, which was the first time he saw defendant after being there with plaintiff, but explains that he was there several times before when defendant was away on his vacation, as a lady in the office informed him. Without going into details it may be said that the testimony of this witness is far from satisfactory as to dates and sequence of events, and an examination of it leads to the impression that his memory often failed to sustain him consistently both as to past events and what he had just previously testified to. Plaintiff testified as to his efforts in negotiating a sale that he saw Lieberman "quite a few times" and tried to prevail upon him to purchase the property at the price offered, and he got him to say he would pay $16,000 for it, but when they talked he was always saying he was "thinking the matter over," and the last time he talked with him and

Digitized by Google

tried to induce him to buy the property was the last part of June, 1913; that he did not know exactly when Lieberman actually bought the property, but first learned the fact in September or October, 1913, when he was passing by there and saw Lieberman fixing the porches; that he could not exactly remember how many times altogether he talked with Mr. Harvey about this proposition but "it was four times I have seen him personally, I was several times up and telephoned, but could not get him."

Many of the facts testified to by Lerner and Lieberman are denied by Harvey, who claims he did not see either of them for nearly a year after they were in his office together, and did not recognize either of them when they came to him again, and first knew that Lieberman was the man brought to him by Lerner when Lerner came to his office in December, 1913, and told him who he was, claiming a commission for his services in the sale of the property. The credibility of these witnesses as to matters which are in dispute is of course for the jury.

If, as defendant claims and testified, plaintiff's agreement with him and undertaking was limited to selling or finding a purchaser of the property for $18,000 cash, it is undisputed that he did not produce a purchaser ready, able, and willing to buy the property at the price fixed, and, having failed in such express contract in relation to which his services were performed and to which they must be ascribed, he cannot recover on the theory of an implied contract to pay for them, even though beneficial, and the court so plainly charged the jury. But this record contains testimony which tends to show a contract of general agency in which defendant controlled and modified the selling price.

Plaintiff did not declare upon a special or express contract. His declaration is upon the common counts.

Digitized by Google

According to his evidence he presented himself to defendant as a real estate agent and inquired if the property in question was for sale, telling him he was working on commission; that defendant said it was for sale and he would take $18,000 for it, asking what commission he expected; that he replied 3 per cent., and defendant told him he thought 2 per cent. was enough on a big deal; that he showed the property to Lieberman and then took him to defendant's office as a prospective purchaser, where, during the course of their conversation while all three were together, defendant stated a price of $17,000 as "the best he would take;" that thereafter he tried to find a buyer at $17,000 and labored with Lieberman from time to time to induce him to purchase the property, he having shown an interest in and offered $15,000 for it; but was unwilling to pay the price asked, though saying he was thinking it over, and about May raised his offer to $16,000; that he saw defendant several times and did not abandon his efforts, that his last talk with Lieberman to induce him to buy the property was in the last part of June, 1913, and in July or August Lieberman bought the property for $17,000, the price defendant had given, when they were all together, as the best he would do.

It appears undisputed that plaintiff was well acquainted with Lieberman and had done other business for him; that he first called his attention to this property, and after the unsuccessful interview in defendant's office did not abandon his efforts or expectation of effecting a sale, but alone followed up the subject, urged the property upon him, and continued efforts to induce him to buy it. In the language of *Brooks* v. *Leathers*, 112 Mich. 463 (70 N. W. 1099), we think that

"it was for the jury to say whether the influence of plaintiff remained, or whether the sale was effected by defendant independently of him."

Digitized by Google

There was no time limit fixed upon this agency, nor any notice that it was revoked. The inference that the purchase resulted from plaintiff's efforts and influence is not without evidential support.

Whatever contractual relations existed between these parties arose from oral negotiations, the somewhat scant substance of which each gives his version and construction of, varying as to the language used, but both parties accepting the interview as indicating some kind of an agreement. Under such circumstances, and particularly in the light of what was said and done afterwards, it was for the jury to determine and construe the dialogue, find upon what propositions the minds of the parties met, and decide what contract was actually made. There is testimony in this case which, if believed, would sustain the jury in finding that a contract of general agency existed between these parties under which the seller retained control of the price, which he modified during negotiations, and that plaintiff found the purchaser, brought the parties together, and was the procuring cause of sale which, under such a contract, is the meritorious question. *Wood* v. *Smith*, 162 Mich. 334 (127 N. W. 277).

As was said in *Prindle* v. *Allen*, 164 Mich. 553 (129 N. W. 695):

"That the sale was made at a price lower than defendant was first instructed to ask, is a matter of no moment, if plaintiff's version of the contract was correct" (citing cases).

In that case there was evidence that defendant told plaintiff if the latter would find a purchaser for the former's farm, fixing the price at $16,000, he would pay him a stated commission, and, having at first offered at the price named, to a prospective purchaser whom plaintiff produced, the farm and certain additional crops and personal property as an inducement to

Digitized by Google

effect the sale, or the bare farm at $14,500, ultimately sold the property to the same party for $15,500, and it was held that such evidence warranted the jury in finding a contract of ordinary agency in which the vendor controlled the selling price, and the agent, having produced a purchaser who bought the property at a price the owner was willing to accept, had earned his commission.

We think the court in its charge fully and fairly stated the conflicting claims and theories of the respective parties, with correct instructions as to the principles of law applicable to both theories, and by which the verdict should be governed, according as the facts were found to be.

We discover no reversible error, and the judgment is therefore affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

SLOMAN *v.* BENDER.

1. PARTNERSHIP—NAME—ATTORNEY AND CLIENT—ACTIONS.
   Attorneys associated as copartners are required, under Act No. 164, Pub. Acts 1913, to file a certificate showing the members of the copartnership, their address, and the partnership name; failure to comply with the statute is a sufficient ground to deny recovery in an action of assumpsit upon an assigned account or claim.

2. SAME—BUSINESS OR PROFESSION.
   Interpreting the provisions of said act, the language "carrying on any business as copartners," includes the profession or practice of law.

Digitized by Google

3. SAME.

When the law prescribes a method for determining the existence of qualifications for a specified calling, and in compliance therewith one who has been found qualified is vested with authority to follow the calling which is otherwise forbidden to him, he becomes subject to legislative regulation, as are other citizens engaged in legitimate pursuits; and the legislature is vested with authority to control the practice of law, as in other business or professional relations, by classifying copartnerships with other pursuits or lines of business. In the absence of any exception in the act no ground for excluding a copartnership of attorneys is to be found. Act No. 164, Pub. Acts 1913 and Act No. 101, Pub. Acts 1907.

Error to Wayne; Lamb, J., presiding. Submitted October 12, 1915. (Docket No. 47.) Decided December 21, 1915. Rehearing denied April 21, 1916.

Assumpsit by Adolph Sloman and another, as copartners in the name of Sloman & Sloman, against Frederick Bender on open account. Judgment for defendant on a directed verdict. Plaintiffs bring error. Affirmed.

Leon H. Hamberger (*Adolph Sloman* and *Edmund M. Sloman*, of counsel), for appellants.

George P. Palmer, for appellee.

STEERE, J. This action was brought in the circuit court of Wayne county by plaintiffs, as copartners, to recover from defendant the balance claimed due upon an open account originally owing by the latter to C. H. Ritter & Co. The declaration is upon the common counts in assumpsit, with an added postscript notice that upon the trial plaintiffs would "give in evidence a certain assignment of account, a copy of which is given below." The copy is as follows:

"For value received, we hereby sell and assign to Sloman & Sloman our account and claim against Fred-

Digitized by Google

erick Bender, of Detroit, Michigan, and authorize them to enforce collection as fully as we might or could do, but at their expense.

[Signed] "C. H. RITTER & Co.,
"By ANTHONY BODDE, Treas.

"May 25, 1908."

The declaration is not dated, nor its date of filing given in the printed record, as required by rule 35 of this court, but plaintiffs' counsel stated during the trial that the case was "started in December, 1913," while defendant's brief states, "The suit against Bender was commenced by summons on December 16, 1913," which, being undisputed, we assume correctly discloses when the action was begun.

Defendant pleaded the general issue with special notice of the defenses that recovery was barred by the statute of limitations, and that plaintiffs, havng sued as copartners, were precluded from prosecuting said action by reason of failure to file with the county clerk a certificate stating who comprised said copartnership, in compliance with the requirements of either Act No. 101, Pub. Acts 1907, or Act No. 164, Pub. Acts 1913. Upon the trial, held May 10, 1915, objection was interposed by defendant to any proof in substantiation of a claim which had accrued to C. H. Ritter & Co., on the ground that plaintiffs had not declared as assignees, but personally under the common counts. A motion for leave to amend the declaration to meet this alleged defect was granted against defendant's objection.

In the trial court it was shown by undisputed evidence, or conceded as true, that the account in question became an account stated in favor of C. H. Ritter & Co. on May 18, 1907, defendant having made his last payment upon the same on that date; that an involuntary petition in bankruptcy was filed against him by Ritter & Co. and others, as petitioning creditors,

Digitized by Google

on May 29, 1907, and that he was adjudicated a bankrupt in the United States bankruptcy court on June 14, 1907; that the claim in question, then amounting to $1,667.75, was duly proved in that proceeding and allowed by the referee in bankruptcy, and two dividends, amounting to $542.08, were paid Ritter & Co. upon said claim out of the bankrupt's estate on or before December 30, 1907; that on October 19, 1908, the United States District Court of the Eastern District of Michigan denied defendant's petition for discharge in bankruptcy, plaintiffs, as counsel for Ritter & Co., having opposed the same, and that, on May 25, 1908, the account in question was assigned to them for their professional services in that connection; that plaintiffs were attorneys at law engaged exclusively in the practice of their profession and had not filed in the office of the county clerk any certificate of copartnership in compliance with either of the acts urged by defendant as a prerequisite to commencing this action.

Defendant's counsel urged in the court below and argues in his brief that plaintiffs ought not to recover, because the account was barred by the statute of limitations; that, not having declared as assignees, but personally, proof of the assigned account from Ritter & Co. was inadmissible under the declaration, and to permit an amendment was to introduce a new cause of action otherwise barred by the statute of limitations, and for the further reason that they had failed to observe the requirements of either of the statutes relative to filing a certificate of copartnership.

At conclusion of the testimony, after hearing argument, the court held that, as plaintiffs had concededly not complied with the requirements of either of the acts touching the duty of copartners to make the names of those constituting the firm a matter of public record, they were not in a position to maintain their action, and directed a verdict for defendant.

Digitized by Google

Counsel for appellants say in their brief:

"Concisely stated, the only proposition involved in the appeal is: Is the practice of the law a profession or a business?"

We are impressed that it is both. The courts, in discussing questions involving the practice of law, so designate it, and plaintiffs' pleadings and proofs tend to confirm this view. A member of the firm testified that "for a period of ten years preceding the trial they were engaged in the practice of law," and "that they were not during said period, as copartners, engaged in any other business;" while the first paragraph of their declaration states that:

"Adolph Sloman and Edmund M. Sloman, copartners, doing *business* as Sloman & Sloman, plaintiffs herein, by Sloman & Sloman, their attorneys, complain of Frederick Bender, defendant herein, of a plea of trespass on the case upon promises, he having been heretofore duly summoned."

In *Wheatley* v. *State*, 79 Tenn. 262, a statute exempting practicing attorneys from jury duty was held not to include all members of the bar licensed and legally qualified to practice law, but only "a party who follows the *business* of the profession of law as his avocation or calling."

In *Breckenridge* v. *Shrieve*, 4 Dana (34 Ky.), 375, the practice of law is also recognized as a "business," with a limitation not always recognized, the court saying that "the borrowing of money is no part of the professional business of an attorney and counselor, or of a firm associated for the pursuit of that business," for which reason it was held that one member of a law firm was not, under the circumstances disclosed, bound by his copartner's activities as a borrower in the name of the firm.

Digitized by Google

The general definition of "business" is:

"That which occupies the time, attention, and labor of men for the purpose of livelihood or profit." Black's Law Dictionary.

See, also, 6 Cyc. p. 259.

Nothing in the act suggests its limitation to those capitalized copartnerships organized for trade, manufacturing, or commerce, to the exemption of that numerous class of nontrading partnerships in occupation or employment, the capital of which consists chiefly of especial skill, experience, and learning in a particular calling. In this age of general education and applied science the old classification limiting the so-designated learned professions to divinity, law, and medicine has largely lost its significance. Many other pursuits and professions now demand equal educational attainments and mentality, with equal years of rigid preparatory training to successfully follow them.

"There is nothing particularly sacred in the profession or business of a lawyer which puts him above the legislative power to place on his shoulders his just share of the necessary burdens of the State." *Cousins* v. *State*, 50 Ala. 113 (20 Am. Rep. 290).

While recognized as a responsible and necessary officer of the court in the conduct of its business, exercising by legislative authority a privilege or franchise in that particular, he is not a public officer in the constitutional or statutory sense of that term.

It is true, as pointed out in appellants' brief, that "a layman may not practice law," while a member of the bar who has once successfully passed his examinations and been admitted to practice as an attorney at law is entitled to follow that profession thereafter, unless disbarred for good cause, but that empty honor affords him few privileges and scant emoluments, unless he industrializes it by engaging in the business of practic-

Digitized by Google

ing his profession for a livelihood or profit, either alone or in combination with others. The fact that he is entered upon the attorney rolls as a member of the bar furnishes no information as to any partnership combinations he may form, and the reiterated purpose of the two acts in question is to make such information as to all copartnerships carrying on any business a matter of public record, certain and readily available for those having occasion to do business with them. The two acts are along the same lines. After the first act had been construed as denying the right of those doing business under fictitious names to enforce their contracts when they had not complied with its requirements, the legislature, without repealing the first statute, enacted Act No. 164, Pub. Acts 1913, requiring the filing of certificates of partnership, signed by each partner, with his address, for the purpose, as stated in the title, of fixing the liability of the copartners, and imposed that prerequisite without qualification as to the kind of copartnership upon any two or more persons engaged in "carrying on any business as copartners."

That the act does not by express language or by implication except attorneys from its provisions is clear. It is unquestionably within the power of the legislative department of the government to include them. While their duties are of such a character and such importance to the public that a standard of qualification is required, and the legislature has delegated to this court with its auxiliary board of law examiners the duty of examination and determination, the matter of regulating the admission of persons to practice law is primarily the subject of legislative control and action. The courts have no more common-law power in that particular than they have over any other pursuit for which special qualifications or a license may be imposed by

Digitized by Google

law. When the law requires and prescribes a method for determining the existence of qualifications for a specified calling, and in compliance with such method one found qualified is invested with general authority to follow such calling which is otherwise forbidden him, while engaged in it he is subject to legislative regulation in reference to it in like manner as other citizens are in reference to other legitimate pursuits in which they are engaged. It is for the legislature, not for the courts, to say whether there should be any classification of copartnerships, or exceptions to the provisions of such statute. None is expressed or implied in the acts under consideration.

As the other questions raised by defendant are not involved in appellants' assignments of error and do not, under the conclusions reached upon the question reviewed, become essential to a final determination of the case, it is not deemed necessary or proper to pass upon them here.

The judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

Digitized by Google

BARBER *v.* McMICKING.

1. EQUITY—DEMURRER—EFFECT—PLEADING.
   The defendant's demurrer to a bill in aid of execution admits the facts charged in the bill.

2. SAME—CREDITOR'S SUITS—BILL IN AID OF EXECUTION.
   A bill in aid of execution lies to relieve shares of stock levied upon by complainant from a claim arising out of a transfer in fraud of creditors; relief is not confined to executions against real estate.

3. SAME—EXECUTION—DEBTOR AND CREDITOR.
   Notwithstanding section 436, 1 Comp. Laws, affecting executions against property of a debtor that have been returned unsatisfied and authorizing a discovery, etc., a complainant who levied on corporate stock standing in the name of the judgment debtor could file a bill in aid of execution when the debtor disclaimed ownership, but declined to say who held the stock, serving a notice to that effect on the complainant as he was about to sell the property upon execution sale.

4. SAME—BILL IN AID OF EXECUTION.
   It is not essential to the jurisdiction of the court of equity that the complainant should sell the property levied on before applying for the remedy in aid of execution.

5. SAME—EXECUTION SALE—CREDITORS' SUITS.
   After securing a lien by execution levy, if a fraudulent obstruction has been interposed to prevent carrying out the sale, the creditor may apply to chancery for a discovery and to remove the obstruction.

Appeal from Wayne; Shepherd, J., presiding. Submitted October 18, 1915. (Docket No. 139.) Decided December 21, 1915.

Bill by William W. Barber and others against Robert L. McMicking and others in aid of an execution at law. From a decree overruling a demurrer to the bill of complaint, defendant appeals. Affirmed.

Digitized by Google

William G. Fitzpatrick and *Joseph F. Kropidlowski* (*M. Hubert O'Brien*, of counsel), for complainants.

Prentis & Mulford, for defendants.

STEERE, J. Defendants appealed from an order of the Wayne county circuit court in chancery, overruling their demurrer to complainants' bill filed in aid of execution, which also asks discovery and injunctive restraint.

The essential substance of complainants' somewhat lengthy bill material to an understanding of the issue raised is as follows: On April 22, 1912, complainants recovered a judgment in the Wayne county circuit court against defendant Robert L. McMicking and R. S. Dodds, indorsers of notes given by the Norris Laundry Company, a defunct corporation, for $5,576.23 damages, with costs taxed at $22.90. On May 5, 1913, for the purpose of collecting such judgment, they caused a writ of execution to be issued and put in the hands of the sheriff of Wayne county who, on the 22d of May, 1913, levied under said execution upon 1,001 shares of stock in the defendant Standard Laundry Company, a corporation doing business in the city of Detroit, which stock at the time of the levy was owned by and stood in the name of defendant McMicking, as appears upon the records of said company and as shown by a certificate obtained from Mr. Henry, secretary and treasurer of said Standard Laundry Company; but said Henry notified the sheriff when such levy was made that said shares of stock had previously been assigned to some third party, refusing, however, to disclose to whom or at what time such assignment was made. On June 2, 1913, the sheriff gave legal notice, and duly advertised that said shares of stock would be sold, on June 6, 1913, under the levy which he had made, at the Congress street entrance of the Wayne county building in the city of Detroit. At the

Digitized by Google

time and place for which said sale was noticed the sheriff publicly offered the shares of stock for sale, and, no bidders being present, the sale was regularly adjourned to the 26th of June, 1913, at the same time and place, notice of which adjournment was duly published in the manner provided by law, and on the 26th of June, 1913, the sale was again so adjourned for want of bidders to July 7, 1913, on which day, at the time and place appointed for the sale, the sheriff was served with a written notice, signed by defendant Robbert L. McMicking, in which he disclaimed and denied ownership and title, then or at any time, to said shares of stock, but did not give any information as to who claimed or pretended to be the owner. Thereupon said sale was adjourned in the same manner to the 21st day of July, 1913, and again to the 4th day of August, 1913. While complainants are informed and believe that said McMicking at the time of such levy was and yet continues to be the actual owner of said shares of stock just as shown by the books of the laundry company, they are unable to learn whether any assignment or transfer of the same was ever made in fact by him which was not entered upon the books and records of said Standard Laundry Company, and charge if any transfer or assignment was made, it was without consideration and a pretended one, "a mere sham, and was made to hinder, delay, and defraud the creditors of said R. L. McMicking and with the intention of defrauding the estate of George D. McNichol, deceased, and your orators," and said stock is held by his assignee without consideration, and in trust for said McMicking; that by reason of such alleged assignment and written notice thereof served upon the sheriff the title and true ownership of said stock has become clouded and in doubt, so that no bidders can be procured for said shares when offered for sale under said levy, and the sheriff is unable to safely and satisfactorily proceed

Digitized by Google

with the sale. The complainants therefore ask that by an order of the court defendants be compelled and directed to discover and disclose the true and rightful owner of said shares of stock, and make answer to certain interrogatories set out in said bill; that the alleged assignment be set aside and declared null and void as to complainants and any purchasers of said stock at execution sale, and the true ownership at the time of the levy declared and decreed to be in said defendant McMicking; that complainants' lien upon said stock by virtue of its levy be sustained and the sheriff authorized and directed to proceed in the execution of said writ; that defendants be restrained by injunction from incumbering or transferring, or in any way interfering with, the title of said shares of stock during the pendency of said suit—concluding with a prayer for general relief.

Defendants' grounds of demurrer are:

"(1) Because the complainants have not, in and by their bill, made or stated such a case as entitles them to maintain their bill, in that the execution has not been returned unsatisfied on the judgment obtained by them, as required by section 436 of the laws of Michigan as compiled in the year 1897.

"(2) Because the bill in aid of execution cannot be maintained where the interest is in personal property.

"(3) Because complainants have a full, complete, and adequate remedy at law."

Defendants' demurrer admits the truth of the allegations in complainants' bill. As framed, it is not a judgment creditor's bill filed to reach equitable assets not subject to legal execution, a prerequisite of which is an execution returned *nulla bona,* indicating that all legal remedies have been exhausted. The bill shows that complainants did find personal property subject to execution belonging to one of the defendants, and levied upon it. They had an unsatisfied valid judgment

Digitized by Google

and a lien upon the property through levy of an execution issued to satisfy such judgment. The bill is filed in aid of that execution, which it is alleged defendants are hindering, delaying, and seeking to defeat by a false and pretended assignment, fraud, and concealment, thus interposing inequitable impediments in the way of a proper and legal enforcement of the execution.

The rules applicable to judgment creditors' bill and bills in aid of execution are not the same, neither are the latter confined to levies upon real estate. *Gibbons* v. *Pemberton,* 101 Mich. 397 (59 N. W. 663, 45 Am. St. Rep. 417); *Hodge* v. *Gray,* 110 Mich. 654 (68 N. W. 979); *Schelowski* v. *Pawlowski,* 168 Mich. 664 (134 N. W. 997); *McKenna* v. *Crowley,* 16 R. I. 364 (17 Atl. 354); *Chardavoyne* v. *Galbraith & Co.,* 81 Ala. 521 (1 South. 771).

Complainants by the scheme of their bill are creditors, with a lien invoking the original, common-law jurisdiction possessed by courts of equity to entertain suits of creditors who have proceeded to judgment and have an execution lien, which is rendered unavailable by some impedient which the debtor has fraudulently interposed to further successful progress in the action at law, and the chancery court is asked to aid in enforcing the lien by removing the fraudulent obstruction.

"In such a case equity is resorted to in aid of the law, to enable the creditor to sell the property to better advantage." *McKenna* v. *Crowley, supra,* where numerous authorities are cited.

That it is not necessary or proper in all cases to first sell the property levied on at execution sale before applying to a court of equity for aid, as defendants contend should be done, is clearly indicated by the above quotation and sustained by this court in *Cranson* v. *Smith,* 47 Mich. 189 (10 N. W. 194).

Digitized by Google

As a general proposition equity courts recognize the right of a judgment creditor to attack any fraudulent conveyance, subterfuge, or device resorted to by the debtor for the purpose of hindering, delaying, or defeating the creditor from realizing upon his judgment. This principle as applicable to the instant case is digested, and we think well supported, by decisions of this court and other jurisdictions in the following annotation to section 436, 1 Comp. Laws:

"Where a lien has been acquired by levy of execution, or where there is an outstanding execution in the hands of an officer and a fraudulent obstruction is interposed to prevent its being levied, a bill may be sustained for a discovery and to remove such obstruction."

Such we find to be the purport of this bill.

The order overruling defendants' demurrer is hereby affirmed, with costs.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

LACEY v. LACEY.

1. DIVORCE—CRIMINAL LAW—SEPARATE MAINTENANCE—HUSBAND AND WIFE.

Punitory proceedings for contempt of the court of chancery against a husband who neglects to pay alimony awarded by a decree of divorce are contingent upon his being found within the jurisdiction of the court. The effect of such decree is also to deprive the wife of her remedy by criminal proceedings under a charge of abandonment.

Digitized by Google

2. SAME—EQUITY—ABSOLUTE SEPARATION.

It was erroneous for the court to grant a divorce to complainant who filed a bill to obtain support and maintenance pursuant to Act No. 243, Pub. Acts 1889, 3 Comp. Laws, §§ 8686, 8687, and who did not desire an absolute divorce; where the defendant husband filed a cross-bill and the court in reviewing the evidence held that his charges had not been sustained by the evidence, finding, also, that the complainant's bill was sustained by the proofs, which showed, among other things, that the husband had frequently desired her to secure a divorce, and she had declined.

3. SAME—STATUTES—ALIMONY.

Where the wife expressed her willingness to renew marriage relations and was ready to do so for the sake of their infant, it was not in the interest of the public that an absolute divorce should be granted against her consent.

Appeal from Muskegon; Sullivan, J. Submitted October 14, 1915. (Docket No. 90.) Decided December 21, 1915.

Bill by Myrtle A. Lacey against Roy E. Lacey for separate maintenance. From a decree of absolute divorce, complainant appeals. Modified.

Cross, Vanderwerp, Foote & Ross, for complainant.

Simpson & Anderson, for defendant.

STEERE, J. Petitioner was decreed an absolute divorce from defendant by the Muskegon county circuit court in chancery on the ground that the material facts charged in her "petition are true, and that the defendant has been guilty of the several acts of extreme cruelty therein charged," and for the further reason it appeared to the court "that it is for the best interest of said parties that an absolute decree of divorce be granted to said petitioner from said defendant." This she neither asked nor desired, and has appealed from said decree, claiming it was in that particular neither

Digitized by Google

within the power of the court nor proper under the proofs, nor for the best interests of said parties, that the same be granted. Her application to the court for relief was in the form of a petition filed in compliance with and under the provisions of Act No. 243, Pub. Acts 1889 (3 Comp. Laws, §§ 8686, 8687 [4 How. Stat. (2d Ed.) §§ 11534, 11535]), entitled:

"An act to provide wives with property and maintenance from their husband's estates when neglected or deserted by them, or when the husband has become an habitual drunkard or has practiced extreme cruelty towards his wife or committed any offense sufficient to entitle the wife to a decree of divorce or separation."

In this petition she neither prayed for a divorce or separation. Her prayer was for financial aid and maintenance. Under the provisions of said act it was necessary for her to set out in her petition extreme cruelty or such other offense as would entitle her to a decree of divorce or separation, had she asked it, and she alleged extreme cruelty, neglect, abandonment, and nonsupport. Defendant filed an answer and cross-bill praying that he be decreed a divorce from petitioner on the ground of extreme cruelty, to which she filed replication and answer in denial. Proofs were taken in open court, and at conclusion of the testimony the court announced an opinion that the charges made by petitioner were fully sustained, while those made by defendant in his cross-bill were wholly unsupported in all material features, severely censuring and condemning defendant's treatment of his wife, stating that neither the court nor the law had "much use for him," and expressed the view that, as "no woman can live with him long because he is too selfish to live with a woman," a divorce should be granted in the interest of all parties, "not for his sake, but for public policy's sake, so that he won't pretend that he can go with young girls and not have any right to do

Digitized by Google

it." A decree of absolute divorce was thereafter filed and entered in favor of petitioner, awarding her as alimony $600 payable in installments of 16 and a fraction dollars per month, and for the support of their infant son 19 months old, of whom she was granted custody, $12.50 per month until he arrived at the age of 14 years.

The parties were married at Muskegon, in April, 1911, where defendant was employed, but shortly after their marriage they moved to Albion, Mich., where he engaged in the moving picture business for a time and later was employed by a concern in the moving picture business located at Gary, where petitioner joined him, and they resided together for some months, when, as the time of her confinement approached, he took her to her mother's home in Gas City, Ind., and left her, since which time he has neglected and deserted petitioner, refusing to accept her as his wife or live with her. Defendant is an expert machinist, and eventually returned to his former employment in Muskegon, where he was employed at a salary of $130 per month, when petitioner finally sought to join him, in March, 1913, and until the hearing of this case. He did not go to Gas City at the time or after the child was born nor send for his wife, and when she went with their infant to him at Muskegon he refused to receive them, telling her to take her baby and go back to her mother, declining to live with her or properly provide for her and her child, or do anything for her unless she would get a divorce. This she declined to do and endeavored unsuccessfully to prevail on him to receive her. He left Muskegon for Detroit, but returned to his former employment soon after. She remained in Muskegon, obtaining such employment as she could, but experiencing great difficulty in doing so, owing to the fact that she had her baby to care for. She finally reached a point of destitution where she was obliged to accept

Digitized by Google

assistance from certain charitably inclined women who discovered her distress. Further details of their domestic difficulties, which culminated in this proceeding, may be passed with the reflection that we find no occasion to disagree with the trial court's conclusions as to defendant's conduct and delinquencies.

He is shown to be without property, real or personal, and execution proof. He desired a divorce from petitioner, whether because of new found preferences, as intimated, or for other reasons, is immaterial. He had urged her to get a divorce, which she declined to do, and he tried unsuccessfully to secure one by cross-bill in this proceeding. By decreeing a divorce to her the court severed the marriage relations as to both and furnished defendant in that particular just what he wanted.

By the decree he is given immunity from pressure by criminal proceedings for deserting and abandoning his wife and child. *People* v. *Dunston*, 173 Mich. 368 (138 N. W. 1047, 42 L. R. A. [N. S.] 1065). Punitory proceedings for contempt of the chancery court in disobeying its order requiring him to pay petitioner alimony are contingent upon his being found within the jurisdiction of the court. It is stated in the brief of counsel for petitioner that he has not complied with the court's order and has left this State. No counsel appeared for him in this court and no brief was filed in his behalf.

The power conferred upon the court by the act under which this petition is filed is as follows:

"The circuit court in chancery of any county in this State in which said husband or wife shall reside, shall, on the application of the wife by petition, allot, assign, set apart and decree to her as alimony the use of such part of her husband's real and personal estate, or such proportion of his earnings, income or revenue as the court may determine, in its discretion, and during the pendency of the proceeding may require the husband

Digitized by Google

to pay such sums to carry on the proceeding, or for her support, as it shall deem necessary, in like manner as * * * in case of suit for divorce."

This petition is confined strictly to the provisions of said act, the first and second paragraphs of the prayer for relief are in the exact language of the act, and the fourth paragraph makes reference in general terms to the statute. The only suggestion in the pleadings that a divorce or separation was desired appeared in defendant's cross-bill, which the court dismissed with emphasis.

While, in suits for divorce either limited or absolute, the court to which application may be made is held vested with discretionary authority to grant an absolute divorce against the desires of the complaining spouse found to be in the right (although only a limited divorce with separate maintenance has been requested) we do not find that under this statute, where no separation of any kind is asked or desired by petitioner, a decree forcing an absolute divorce upon an innocent wife has been sustained.

The recognized reason moving courts to decree absolute divorce against the desires of the innocent party, in cases where the testimony is such as in the opinion of the court shows reconciliation impossible or improbable, is said to be "on the ground of public policy to prevent the mischiefs arising from turning out into the world in enforced celibacy persons who are neither married nor unmarried." By that test, if recognizable in any case under the statute, it is questionable whether public policy demands that this delinquent defendant be turned out into the world, according to his desires, against petitioner's protest, freed from the restraints of his marital relations with her and at legal liberty to repeat the conduct which the court now condemns, with some other woman.

The evidence shows that petitioner refused defend-

Digitized by Google

ant's request to institute divorce proceedings against him to nullify their marriage. She testified that she was ready, willing, and desired to live with him again; was, after all which had occurred, attached to him and objected to a divorce, not only on her account, but particularly that of her infant son, saying of defendant:

"I would be glad to make a home for him for the sake of the baby, because I think the baby boy should have his father's companionship."

We think public policy does not demand that this woman should be deprived against her protest of her wifely rights, but should be left to seek such redress as the courts of law, civil or criminal, may in the future afford. As is well said in *Coon* v. *Coon,* 163 Mich. 644 (129 N. W. 12):

"Certainly it is not for the interest of the State that the guilty husband, who has violated his marriage covenant, should obtain by indirection a divorce from his innocent wife, who is willing to condone his offense and renew marital relations."

The decree must be modified and limited to come within the scope of the petition in this case and the statute under which it is filed, omitting absolute divorce and limiting its provisions to maintenance of the neglected and deserted wife and child, with her monthly allowance continuing until the further order of the trial court, with costs to petitioner.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

Digitized by Google

HOOKER *v.* BLAIR.

CARRIERS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

A passenger who, on hearing the brakeman call a station, and seeing him open the vestibule door, left his seat and went to the platform, believing from the jar of the train that it had stopped, and attempted to alight from the steps of the moving car, in the darkness, was guilty of contributory negligence; and the receivers of the road were not chargeable with negligence for announcing the station before the train arrived there, or had stopped.[1]

Error to Kent; Brown, J. Submitted October 15, 1915. (Docket No. 116.) Decided December 21, 1915.

Case by William W. Hooker against Frank W. Blair and others, as receivers of the Pere Marquette Railroad Company, for personal injuries. Judgment for plaintiff. Defendants bring error. Reversed.

Bills, Parker, Shields & Brown (*Charles E. Ward,* of counsel), for appellants.

Smedley & Linsey and *Charles G. Turner,* for appellee.

MOORE, J. This case arises out of an injury to the plaintiff while alighting from one of defendants' trains. Plaintiff's testimony on the trial was in substance:

"On the 29th day of September I was going to Englishville to work driving team. It was telephone work

[1] On carrier's duty to prevent passenger from leaving train while in motion, see note in 31 L. R. A. (N. S.) 625.

On negligence of passenger in getting on or off a moving train, see notes in 21 L. R. A. 354, 22 L. R. A. (N. S.) 741, L. R. A. 1915C 181.

On the assumption by passenger that car will stop at proper place for alighting, see notes in 2 L. R. A. (N. S.) 115, 9 L. R. A. (N. S.) 1113.

Digitized by Google

for the Citizens' Company." He took a seat in the middle of the smoking car. The train was a vestibuled train. "I had never ridden to Englishville before on this road. It was my first trip up there. Just before I got off I saw the brakeman going through the coach I was in. When he went through he announced the station: 'Englishville; Englishville.' He said this at the head end and at the rear end of the coach. As he went out the rear end of the coach he opened the coach door. * * *

"Q. As the brakeman went out, what, if anything, did you notice with reference to the train?

"A. The train came to a halt. I thought it was stopped.

"Q. What did you notice with reference to it?

"A. Why, the jar of the train—the train, you can feel the jar of the train when it is stopping, when it is slack.

"Q. Where were you when you noticed that?

"A. I was in my seat.

"Q. How long did you remain in your seat after that?

"A. Oh, a very short time.

"Q. Then did you get up out of your seat?

"A. I got up out of my seat and walked to the door. * * *

"Q At the time that you got out of your seat, was the train in motion, or what did you think about the train being in motion?

"A. I thought the train had stopped. * * *

"Q. And when you got to the rear end of the coach did you see any of the trainmen?

"A. I saw the conductor.

"Q. And where was he standing?

"A. He was standing on the coach behind the smoker, next to the smoker.

"Q. Which way was he looking?

"A. Well he was faced towards me.

"Q. Looking towards you?

"A. Looking in that direction.

"Q. When you got to the platform, rear platform, of the smoker, what did you notice?

"A. I noticed the door; the vestibule door was open; the side door was open.

Digitized by Google

"Q. Where was the brakeman at that time?
"A. I didn't see him. * * *
"Q. What did you do when you got to the platform?
"A. I walked down the steps.
"Q. Then what did you do?
"A. My last step was to the ground.
"Q. When you stepped to the ground, what did you find?
"A. I found I was in hard shape—in the cattle guard.
"Q. What did you find with reference to the train, whether or not the train was in motion when you stepped to the ground?
"A. I knew then the train was in motion, when I stepped off and was thrown. (Continuing:) It throwed me onto the cattle guard. There was no light there. The condition outside was very dark. It was a very dark night.
"Q. Could you observe, from anything you could see on the outside, whether the train was in motion?
"A. I could not. I couldn't see anything * * *
"Q. What did the conductor say to you when he came out?
"A. He didn't say anything."

This appears in the cross-examination:

"Q. When you walked out there on the platform, you say the conductor was the only man you saw, and you looked for the brakeman and did not find him. Did you say anything to the conductor.
"A. No, sir.
"Q. Or he to you?
"A. No, sir.
"Q. You didn't say anything to anybody then?
"A. No, sir.
"Q. Walked off?
"A. Why, certainly, I just walked off."

Plaintiff further testified that when he came out of the car door of the smoker he did not see the brakeman on the steps of the car, and thought the brakeman was on the ground to assist passengers in getting off, and that for that reason he thought the train had stopped.

Digitized by Google

He says he saw the conductor on the platform of the ladies' coach, and therefore supposed that the brakeman was on the ground. He knew the brakeman customarily carried a lantern, but did not see the lantern of this brakeman outside as he stepped from the car. He looked for the brakeman on the ground, but did not see him. He also testified he had been told it was the custom for some one to remain on guard when the vestibule doors were opened, and that as the station had been called, and he had felt a jar which indicated to him the train had stopped, and the doors were open so that one could alight, and as he did not see the brakeman, that all these circumstances together justified him in alighting. The case was submitted to the jury. From a verdict and judgment in favor of the plaintiff, the case is brought here by writ of error.

There are four groups of assignments of error discussed by counsel, but the important one is whether a verdict should have been directed in favor of the defendants as requested. Counsel insists the action of the trial judge in submitting the case to the jury is justified by many cases cited by him, the important ones of which are *Burke* v. *Traction & Electric Co.*, 147 Mich. 172 (110 N. W. 524), *Walters* v. *Railway Co.*, 113 Wis. 367 (89 N. W. 140), *Louisville, etc., R. Co.* v. *Moore*, 150 Ky. 692 (150 S. W. 849), and *Bartle* v. *Railroad Co.*, 193 N. Y. 362 (85 N. E. 1091). A reference to these cases will show most of them to be distinguishable from the instant case.

Burke v. *Traction & Electric Co., supra,* was against a street railway company. It was said in the opinion:

"The principle of these cases has no application where the car is started when a passenger is alighting therefrom at the invitation, express or implied, of the carrier. In such a case—and this is such a case—it is, as above stated, negligence for the carrier to start the car."

Digitized by Google

In *Walters* v. *Railway Co., supra,* the train had stopped, and it was claimed the train was started when the passenger was attempting to alight. In disposing of the case it was said:

"The queston of contributory negligence was also one for the jury. It is well settled that an adult who unnecessarily steps from a train which he knows to be in motion is guilty of contributory negligence as a matter of law. *Brown* v. *C., M. & St. P. R. Co.,* 80 Wis. 162 [49 N. W. 807]. But in the present case the plaintiff testifies that he did not know the train was moving when he stepped off. While such a statement might well seem incredible if made 25 years ago, it is not so now. It is matter of common knowledge that vestibule trains, with improved couplers and running on a first-class roadbed, frequently start so noiselessly and imperceptibly as to attract no notice, especially when the outside darkness prevents the passenger from noticing the fact by the use of his eyes."

In *Louisville, etc., R. Co.* v. *Moore, supra,* the following appears in the opinion:

"Ordinarily a passenger, who is injured by stepping from a train while it is moving at a rate of speed that makes it probably unsafe for him to do so, would be held guilty of such negligence as would prevent a recovery. *Glascock* v. *C. N. O. & Tp. Ry. Co.,* 140 Ky. 720 [131 S. W. 779]; *Hewlett* v. *L. & N. R. R. Co.,* 15 Ky. Law Rep. 178; *Adams' Adm'r* v. *L. & N. R. R. Co.,* 82 Ky. 608. But if appellee, while a night passenger on appellant's train, was informed by one of the train employees that it had reached his destination, such information being attended by the lessening of the speed of the train, as if for the purpose of stopping, and the train porter, while the train was still in motion, in his presence, stepped from it ahead of him, immediately after calling to him to get off, and appellee was induced thereby to step from the train in the belief that it had stopped, and by reason thereof fell and was injured, he was not guilty of negligence, unless, notwithstanding the direction from the porter to alight, he knew, or by the exercise of ordinary care might have discovered, that the train was still in motion, and that

Digitized by Google

it was, under the circumstances, dangerous for him to attempt to alight from it."

Certainly the above cases are not like the case we are considering. The case of *Bartle* v. *Railroad Co.*, *supra*, is more in point. In this case it appeared:

"The train consisted of a number of cars, and, being crowded, the party were compelled to go through two or three cars to the forward one, which was next to the engine, there being no baggage car on the train. It is in evidence that in the front portion of the car there were no lights, no trainman with lantern, and the curtains, or most of them, were pulled down; also, that there was no light on the rear of the engine; that the station at Chili was unlighted and closed at the time the train arrived; that it was a very dark night, and no objects could be seen when looking off from the front platform of the forward car."

The conditions were somewhat unlike the case before us, though there is language used in the opinion that justifies what is claimed for it by counsel.

In *Morris* v. *Railroad Co.*, 127 La. 446, 447 (53 South. 698, 31 L. R. A. [N. S.] 629), the following language appears:

"The train was still in motion. Plaintiff testified that it was in motion, but that he was not aware of it at the time. The question arises: Did it not devolve upon him to satisfy himself before alighting that the train was standing ready to permit passengers to alight? If a passenger, who has every reasonable opportunity to assure himself that the train is at full stop, fails to make inquiry, he cannot hold others liable for damages in case he alights while it is in motion and is hurt."

The case of *Mearns* v. *Railroad Co.*, 163 N. Y. 108 (57 N. E. 292), is much like the present case. The only difference is that the train was moving into a well-lighted station. In the opinion occurs the following:

Digitized by Google

"In the case of *Solomon* v. *Railway Co.*, 103 N. Y. 437, 442 [9 N. E. 430, 57 Am. Rep. 760], Andrews, J., in delivering the opinion of the court, says:

"'It is, we think, the general rule of law, established by the decisions in this and other States, as claimed by the learned counsel for the respondent, that the boarding or alighting from a moving train is presumably and generally a negligent act *per se*, and that in order to rebut this presumption and justify a recovery for an injury sustained in getting on or off a moving train it must appear that the passenger was, by the act of the defendant, put to an election between alternative dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety.'

"Applying this rule to the facts under consideration, it is evident that there is a total absence of any act or direction of those having the charge of the train which interfered with the free agency of the plaintiff, or that in any manner diverted his attention. All that was done by the guard was to call out: 'All out; Jersey City; last stop!' This notice was given before the train had stopped, and this fact was well understood by the plaintiff. He knew it to be the usual notice given in advance of the arrival of the train at its stopping place, notifying the passengers that the train was nearing the station, in order that they might get ready to alight. He acted upon the notice leisurely, preparing himself to leave the train, gathering together his belongings, and then walked toward the front of the car, stopping and leaning against a partition for a time, waiting unquestionably for the train to arrive at and enter the station. No unusual situation was created. He was in no manner interfered with. As the car was entering the trainhouse the guard stepped into the vestibule and opened the door. He then stepped into the vestibule in front, as the plaintiff stepped out and descended the steps. There was nothing unusual in this. Nothing had been said or done that would lead the guard to suppose that the plaintiff did not understand the situation, or that he

Digitized by Google

was mistaken about the train having come to a stand. Ordinarily passengers have no difficulty in determining whether a train has stopped. They are usually as sensitive to a moving car as any guard or conductor could be, and heretofore it has never been understood to be the duty of a railroad company to expressly warn its passengers of the starting or of the stopping of the train. This was not a rapid transit or elevated railroad, in which a different custom may prevail. If such a duty is now imposed upon railroad companies, their burden will be materially increased and they cannot properly open the door of a car for the exit of passengers until it has actually come to a stop."

The last-named case was before the Federal court in 139 Fed. 543 (71 C. C. A. 331). We quote from the opinion:

"The contention of the plaintiff is, in effect, that when the porter, or guard, made the statement, 'Jersey City; last stop; all out!' and followed it by opening the vestibule door, it amounted to a positive assurance by the defendant that the car had stopped, and was an 'invitation' to the plaintiff to alight, accompanied with a guaranty that he could do so with safety. It is argued that it was the duty of the porter to know whether the car had stopped or not; if he did not know, it was negligence. If, on the other hand, he did know, he should have warned the plaintiff not to get off, and his failure to do so was negligence. We do not think this contention can be maintained. It places upon carriers obligations which practically make them insurers of the lives and limbs of their passengers. It lays down a new, a stringent, and an impracticable rule, which will extend their liability far beyond its present limit, and will, in effect, render them liable for injuries sustained by passengers in alighting from moving trains, whether made up of vestibuled or ordinary coaches, whenever a guard who has announced a station and opened the car door, fails to inform them that the train is in motion, and the party injured testifies that he supposed that the train was at a standstill. We prefer to take the view of the facts entertained by the court of appeals. The statement of the porter was not an 'invitation' to alight, but was the usual an-

Digitized by Google

nouncement of a fact of interest to the passengers, namely, that they had reached or were about to reach the end of their journey. The opening of the door of the vestibule did not warrant the inference that the car had stopped, but was only another act to facilitate the rapid and orderly egress of the passengers, after the train had stopped. Even though it be assumed that the porter knew that the train was in motion and that he saw the passenger (plaintiff) step down from the platform, this falls far short of showing that he knew or ought to have known that the plaintiff intended to step off. It is so common for eager passengers in approaching a station to descend to the last step, in order to avail themselves of the first opportunity to alight, that a guard who called out to a passenger in such a situation, 'Don't get off; the train has not stopped,' would probably be denounced as an impertinent interloper. We cannot resist the conclusion that the deplorable accident which befell the plaintiff was attributable to his own lack of caution and was not due to the negligence of the defendant.

"We agree with the supreme court of Massachusetts when they say in a case very similar upon the facts:

"'Assuming that the action of the brakeman in calling the station and fastening back the door was to be regarded as an invitation, it was clearly not an invitation to alight from a moving train, but from the train after it had come to a stop. It did not authorize the plaintiff to attempt to get off from the train when in motion. But we do not think the action of the brakeman can, as a matter of law, be regarded as an invitation. It was, at the most, simply an announcement that the train was near the station, and would presently stop, and was given in order that passengers intending to alight there might prepare themselves to do so when the train stopped.' *England* v. *B. & M. R.*, 153 Mass. 490 (27 N. E. 1)."

See, also, *England* v. *Railroad*, 153 Mass. 490 (27 N. E. 1), and *Baltimore, etc., R. Co.* v. *Mullen*, 217 Ill. 203 (75 N. E. 474, 2 L. R. A. [N. S.] 115, 3 Am. & Eng. Ann. Cas. 1015), where the last-named case is referred to.

The questions presented in this case are not new in this State. In *Mitchell* v. *Railway Co.*, 51 Mich.

Digitized by Google

236 (16 N. W. 388, 47 Am. Rep. 566), the station had been called, and the plaintiff supposed the train had stopped, and in alighting was hurt. The following language was used by Justice CAMPBELL:

"It is also well settled that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course itself is improper. There must be some special circumstances calling for more particular care or caution, in order to make a liability. *Stephenson* v. *G. T. R. Co.*, 34 Mich. 323; *G. R. & Indiana R. R.* v. *Judson*, 34 Mich. 506; *Flint & P. M. Ry.* v. *Stark*, 38 Mich. 714; *Downey* v. *Hendrie*, 46 Mich. 498 [9 N. W. 828, 41 Am. Rep. 177]; *Mich. Cent. R. R.* v. *Coleman*, 28 Mich. 440; *Haas* v. *G. R. & Ind. R. R.*, 47 Mich. 401 [11 N. W. 216]; *Chicago & N. W. Ry. Co.* v. *Smith*, 46 Mich. 504 [9 N. W. 830, 41 Am. Rep. 177]; *Brown* v. *Congress & Baker St. Ry.*, 49 Mich. 153 [13 N. W. 494]; *Henry* v. *Lake Shore & M. S. Ry.*, 49 Mich. 495 [13 N. W. 832].

"The only cause of the mischief, leaving defendant's carefulness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore get out. There was nothing at the spot to indicate a landing place, and there was, at the proper place, a short distance further on, a building and platform appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and from the distance mentioned we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this. * * *

"The company, as held in some of the cases above cited, cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the everyday incidents of railway traveling, and the company could not do business on any other basis."

Digitized by Google

See, also, *Bradley* v. *Railway Co.*, 107 Mich. 243 (65 N. W. 102); *Lake Shore, etc., R. Co.* v. *Bangs*, 47 Mich. 470 (11 N. W. 276); *Minock* v. *Railway Co.*, 97 Mich. 425 (56 N. W. 780).

The accident is greatly to be regretted, but we do not think plaintiff did what a reasonably prudent man should have done before leaving the train, nor do we think negligence on the part of the railroad was shown. Upon both grounds a verdict should have been directed for defendants.

Judgment is reversed, and new trial ordered.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

JORDAN *v.* WIXSON.

1. AUTOMOBILES—NEGLIGENCE—LAW OF THE ROAD—PERSONAL INJURIES.

   In an action for injuries sustained in a collision with defendant's automobile, language of the trial court, in the charge to the jury, that plaintiff was "bound to use every reasonable means to avoid a collision," read in connection with other instructions, *held*, cured or modified so as to avoid prejudice.

2. SAME.

   Held, that the testimony warranted a verdict and judgment for the defendant on the theory of contributory negligence.

Error to Calhoun; North, J. Submitted October 18, 1915. (Docket No. 149.) Decided December 21, 1915.

Digitized by Google

Case by Jesse Jordan against Don C. Wixson for personal injuries. Judgment for defendant. Plaintiff brings error. Affirmed.

R. G. Leitch, for appellant.

Joseph L. Hooper, for appellee.

MOORE, J. This case was brought to recover damages for personal injuries received by the plaintiff, in a collision between his one-horse wagon and an automobile owned and driven by the defendant. The case was tried by a jury, which returned a verdict in favor of the defendant. A motion was made for a new trial. In overruling the motion the judge stated, in part, as follows:

"While the testimony of the plaintiff as given probably raised a question which should have been, and was, left to the jury to pass upon, still under his own testimony it may well be doubted as to whether or not the defendant was not entitled to have the verdict directed by the court."

The plaintiff was going west driving an old gentle horse hitched to a truck wagon. There was a bridge in the highway over a creek. The plaintiff left the bridge at his right, driving through the creek, and after watering his horse continued on his journey west. Shortly after he rejoined the highway, his attention was diverted by a threshing machine, which was 10 or 12 rods away in front and to the right of him. The road west of him was slightly upgrade and was in plain view for 25 or 30 rods. It is plaintiff's claim that he was driving on the right side of the traveled portion of the highway, that he neither heard nor saw, though his eyesight and hearing were good, the automobile until it was within 10 feet of him, when it almost instantly struck the rear wheel of his wagon, injuring it somewhat and hurting the plaintiff.

Digitized by Google

It is the claim of defendant, who was driving his own automobile, his wife and a lady friend being on the back seat, that when he was 12 or 15 rods away from the plaintiff he signaled with his horn, and did so several times; that he slowed down his machine and turned completely out of the traveled part of the way, and, supposing the plaintiff would give part of the right of way, expected to pass in safety; that he passed the horse and the front part of the wagon, and would have passed the whole of it if the road had not narrowed back of the wagon so that to avoid going into the ditch, which was 3 or 4 feet deep, he had to turn toward the traveled part of the road, and in doing so hit the back wheel of the wagon; and that he stopped his automobile within 3 feet of the rear part of the wagon.

Some of the men who were at the threshing outfit were at the scene of the accident within two or three minutes, and they were called as witnesses by the plaintiff. They say the hind wheels of the automobile were just about opposite the back tracks of the wagon, that the tracks of the wagon were nearly in the middle of the road, that the automobile tracks showed it was being driven on the right side of the road, and if the automobile had kept straight ahead it would not have touched the wagon, but if it had kept straight on it would have gone into a three-foot ditch.

A witness who seemed to be entirely disinterested gave the following version of the occurrence:

"I was along that road on the day the accident occurred. I was going west at the time, following Mr. Jordan. I had just crossed the bridge. I imagine I was 15 or 20 rods behind him. I was driving a double team. Mr. Jordan was in the center of the highway. Mr. Wixson was coming down the hill, and he was not coming at a very rapid pace. He was going at the average gait of an automobile. I think he was not going at a rapid rate. Mr. Jordan was very busy engaged

Digitized by Google

watching them thresh, and was not paying attention to what was going on in the road. Mr. Wixson turned out to his own side of the road and gave him all he could. Mr. Wixson had to hit him or go into the ditch himself. He sounded his horn several times. It was sounded loudly enough so that I could hear it from where I was. Both women jumped up from the back seat and hollered. Mr. Wixson hollered himself, 'Get out of the way.' From what I observed there, and from the position of Mr. Jordan's wagon in the center of the road, it was impossible for Mr. Wixson to have got by there without going into the ditch himself, or without striking the carriage. He gave him sufficient warning so that he had a chance to have observed that there was danger ahead. After they got Mr. Jordan into the road and fixed up, he stood there, and he says: 'I am awfully sorry. It was my fault.' He says: 'I didn't hear you. Why didn't you stop?' Mr. Wixson did not go over two or three feet beyond the point where he struck the wagon. I observed Mr. Jordan looking over at the threshing machine. I could not help but see him. His horse was walking along very slowly."

All of the witnesses who saw the transaction except the plaintiff testified substantially the same as the witness whose testimony we have quoted.

The errors claimed are (we quote from the brief of counsel):

First, error in the court's charge as to the degree of care required of the plaintiff.

Second, error in the court's charge in regard to the degree of care required of the defendant.

Third, error in refusing to give proper requests to charge.

Counsel quote a few sentences from different portions of the charge, and say they were improper statements of the law. The following is an instance:

"Bear in mind that the law also places the duty upon the plaintiff in this case to exercise the same degree of care and caution as he approached the automobile from the one direction as is placed upon the driver of

Digitized by Google

the automobile under the circumstances of this case. In other words, the plaintiff himself was bound to use every reasonable means to avoid a collision between the two approaching vehicles."

The argument is (we again quote from the brief):

"This court has recognized the difference between the use of 'every reasonable precaution' and ordinary care, and has reversed a case for the error of the trial judge in charging that a party must use both." *Levyn* v. *Koppin*, 183 Mich. 232 (149 N. W. 993).

The trial judge, after stating the claims of the parties, charged the jury, in part, as follows:

"I think at the outset it is advisable for me to read to you, from the motor vehicle statute, portions which may apply to the issue which is to be submitted to you, and the material portions of which are, in substance, as follows:

"'Every motor vehicle operated and driven upon the public highways of this State shall be provided with adequate brakes sufficient to control the vehicle at all times and a suitable adequate bell, horn, or other device for signalling. Whenever a person operating a motor vehicle shall meet on the highway any other persons riding or driving a horse or horses or other draft animal or any other vehicle the person operating such motor vehicle shall seasonably turn the same to the right of the center of the traveled portion of the highway while the person approaching shall likewise turn from the center of the traveled portion of the highway so as to pass the motor vehicle on the opposite side of the center of the highway to which the motor vehicle is being turned.

"'No person shall operate a motor vehicle upon the public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and the use of the highway, or so as to endanger the life or limb of any person or the safety of any property and shall not in any event while upon any highway run at a higher rate of speed than twenty-five miles per hour.

"'Upon approaching a person walking in the roadway of a public highway or a horse or horses or other draft animals being led, or driven thereon, the person operating the motor vehicle shall slow down to a speed not exceeding ten miles an

Digitized by Google

hour and give reasonable warning of its approach and use every reasonable precaution to insure the safety of such person or animal.' * * *

"If you find from the evidence in this case that the defendant did not comply with this duty, and the injury resulted from his failure to do so without any negligence on the part of the plaintiff concurring, then plaintiff would be entitled to a verdict.

"You are further instructed that it was the duty of the defendant, when approaching plaintiff and his rig, to slow down to a rate of speed not exceeding ten miles per hour, and give reasonable warning of the approach of his automobile, and also to use every reasonable precaution to insure safety of the plaintiff and his horse; and if you find that the defendant did not slow down to a speed of ten miles per hour or less, upon approaching the plaintiff, and that the injury to plaintiff resulted from his failure to do so and without any negligence upon the part of the plaintiff; and if you find that the defendant did not use every reasonable precaution to insure the safety of the plaintiff and his horse upon so approaching the plaintiff, and that the injuries resulted from defendant's failure so to do and without negligence on the part of the plaintiff—your verdict as before stated would be in favor of the plaintiff. But in that regard, gentlemen, you should bear in mind that the law also places the duty upon the plaintiff in this case to exercise the same degree of care and caution as he approached the automobile from the one direction as is placed upon the driver of the automobile under the circumstances of this case. In other words, plaintiff himself was bound to use every reasonable means to avoid a collision between the two approaching vehicles."

It is clear, when that part of the charge which is criticised is read in connection with what precedes and follows it, that the criticism is shown to be without merit, and it distinguishes the instant case from *Levyn* v. *Koppin, supra.*

The charge was long, filling more than ten pages of the printed record, and fully covered every phase of

Digitized by Google

the case. We do not think it misled the jury. We do not see how they could have arrived at a different verdict under the evidence.

Judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

DUNN *v.* DETROIT, JACKSON & CHICAGO RAILWAY.

STREET RAILWAYS—INTERURBAN ROAD—CROSSING ACCIDENT—NEGLIGENCE—PERSONAL INJURIES—LIGHTS—SIGNALS.

Plaintiff was struck and injured as he attempted to drive across defendant's interurban track, on a dark night. He testified that he stopped, looked, and listened before he drove on the tracks, that he neither saw nor heard the approaching car, that no whistle or other signal was sounded, and that the car did not display a headlight. He discovered the car when it was about seventy-five feet away and did what he then could to avert an accident. He claimed to have been two rods from the track when he made his first observation, and admitted that he did not look again until his horses were nearly across the track, which his team crossed about at a right angle. The track lay along the street on which he was traveling and crossed to the north side at the point of the collision, the car coming from the direction in which he was going. *Held*, that the testimony warranted an inference that if a headlight had been in place on the car he would have been able to discover its approach, that the evidence was sufficient to sustain a verdict for plaintiff, who could not be held chargeable with contributory negligence as a matter of law.[1]

[1] On the duty to look and listen before crossing tracks of an electric road, see notes in 15 L. R. A. (N. S.) 254, 23 L. R. A. (N. S.) 1224.

Digitized by Google

Error to Wayne; Van Zile, J. Submitted October 18, 1915. (Docket No. 147.) Decided December 21, 1915.

Case by Fred Dunn against the Detroit, Jackson & Chicago Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody and *William G. Fitzpatrick,* for appellant.

Edward M. Vining and *William C. Gottman,* for appellee.

OSTRANDER, J. Plaintiff, in a wagon with a load of furniture, was driving a team of horses through the village of Dearborn, going west on Michigan avenue. It was about half past 8 o'clock in the evening. The night was dark. The street is 82 feet wide, and paved. West of the village the highway is 66 feet wide, about 16 feet of it being macadamized. Defendant's track occupies the center of the street in the village and the north side of the highway west of the village. Plaintiff was familiar with the situation, knew that he must cross the railroad track, and his testimony tends to prove that he drove so as to cross the angling track squarely, or nearly so. He was alone, and testifies that before attempting to cross the track he stopped the team, looked before and behind him, listened, neither saw nor heard an approaching car, and proceeded. His horses were walking. A car from the west struck the wagon, causing the injury complained about. He had no warning of the approach of the car, no headlight was burning, no gong sounded, no whistle blown. When he first saw the car, it was 75 feet from him. He then saw a light inside, or outside, of the car —knew that the car was coming. Testimony for defendant tended to prove that the collision occurred,

Digitized by Google

not on the angling track, but about 150 feet east of the point where the track curves to the north, that the whistle was sounded some 500 feet from where it occurred, the headlight was burning, the car lighted inside, the car was slowed down on account of the approach to the angle in the track, and plaintiff's position was not disclosed to the motorman until the car was upon, or was about to swing from the angling to and upon, the straight east and west track through the village. When plaintiff's position was seen, he was in the middle of the track, headed west. Although every means to avert a collision was then employed, it could not be avoided.

There are various details of distances, time, and other circumstances not stated in the foregoing rather general outline of what the testimony tended to prove, relied upon in the trial court and here as establishing beyond question the contributory negligence of plaintiff, even if it be conceded that the headlight upon defendant's car was not burning. A verdict for plaintiff was returned by the jury, and judgment was entered upon the verdict. The refusal of the court to direct a verdict for defendant at the close of plaintiff's evidence and at the close of all the evidence, refusal to grant a new trial upon the ground that the verdict was against the weight of evidence, and the refusal of the court to give defendant's requests to charge, are assigned as error. The requests to charge preferred by defendant were the following:

"(1) Under the evidence in the case, the plaintiff cannot recover, and your verdict will be for the defendant.

"(2) The plaintiff under the evidence is guilty of negligence which at least contributed to his injury, and your verdict will be for defendant.

"(3) To drive two rods after looking, and then going upon and across a railroad track in the nighttime without looking just before going upon the track and

Digitized by Google

without reassuring oneself that the crossing was safe, is negligence as a matter of law preventing a recovery on the part of one struck by a car before he gets over the track, no matter what the negligence of the defendant may be.

"(4) By the clear and overwhelming weight of the evidence, the lights on the inside of the car were lighted before and at the time the accident happened.

"(5) Even though the headlight was not burning as the car approached the scene of the accident, it is inconceivable that, had plaintiff looked at all, he would not have seen or heard the car as it was approaching in sufficient time to have enabled him to stop his team and let it pass.

"(6) The fact that the car struck the wagon before plaintiff had succeeded in getting across the track, according to his theory, is conclusive evidence that it was very near and was in motion approaching towards him at the time he claims to have stopped. looked, and listened.

"(7) It appears from plaintiff's evidence that not more than three seconds elapsed between the time that he started up his horses and the instant of collision. Under the undisputed evidence and the physical facts, the car could not have been more than a few feet distant when this observation was made, and it was negligence for the plaintiff to start and attempt to cross the track.

"(8) Even if it be assumed that no whistle was blown or gong rung, the failure to blow a whistle or ring a gong cannot be said to have been the proximate cause of the accident, and for such failure no recovery could be had in this case."

It is said in the brief for appellant:

"It does not answer for plaintiff to say that he looked and did not see, when the physical facts prove to a demonstration that if he looked he must have seen, or that he looked inattentively or heedlessly."

According to the testimony of the plaintiff, when he stopped his team for the purpose of observation, it and the wagon were on the north side of and substantially parallel with the railroad track, which immediately in

Digitized by Google

front of him curved to the right across the line of the course he had been pursuing. He did not turn at right angles to his former course, but did diverge from it to the south. On the course he took he had to travel a considerable distance before the rear of his wagon was across the track.

"*Q.* From the time that you looked west when your horses' heads were two rods away from the point where you crossed this track, you never looked again, did you?

"*A.* Yes, I looked, drove my horses across.

"*Q.* And you did not look again until your horses crossed the track, is that right?

"*A.* Yes, sir.

"*Q.* After you made your last look to the west, you drove your horses two rods and across the width of the track before you looked again, and then, when you looked, the car was right on top of you?

"*A.* Yes, sir. * * * When I fist saw the car, it was 75 feet away."

Recalled, the plaintiff testified, among other things:

"*Q.* In crossing the track in reference to looking, what did you do?

"*A.* I looked and drove my team across, and when I drove across there I was looking west. * * *

"*Q.* In other words, from this point where the heads of your horses were two rods away from the point of the track where you crossed, you had to swing the heads of your horses slightly and then square them around again to the south in order to cross the track at right angles. Isn't that so?

"*A.* No, sir.

"*Q.* You did cross the track with your wagon wheels at right angles, did you?

"*The Court:* Right angles with the track?

"*Q.* Right angles with the track?

"*The Court:* When you crossed. Do you know what right angles means?

"*A.* Cramped to the right?

"*Q.* No, no; do you know what is right angles?

"*The Court:* Right straight across; did your wheels

Digitized by Google

strike that track square across it, or did it strike it at an angle?

"A. It was pretty much of a right angle, as I could judge.

"Q. In other words, you testified the other day, didn't you, that you aimed to let both wheels of your wagon strike the track at once?

"A. Yes, sir.

"Q. You wanted to go squarely across the track, that is what you said the other day?

"A. Yes, sir.

"Q. You did have to make some change, didn't you—

"A. No, sir.

"Q. — in your direction?

"A. No, sir.

"Q. Then you had to swing your horses to the left, and towards the track then?

"A. I did not swing them to the left.

"Q. You did, I say?

"A. Yes, sir."

There is, I think, a patent distinction between this case and *Colborne* v. *Railway*, 177 Mich. 139 (143 N. W. 32), a case cited and relied upon by appellant. The trial court apparently had it in mind when he refused a peremptory instruction to the jury. If it were conceded, or was fairly established, that if plaintiff had looked attentively he must have seen the car, or that he was inattentive in the observation he made, then, of course, a different case would be presented. But neither fact is conceded, and the inferences which appellant seeks to draw from all of the disclosed surroundings are not the only or necessary ones. At night, in the country, where cars or trains are occasional, one expects to discover an approaching car or train by hearing or seeing it. One looks for a light, or for lights. It must be assumed that defendant's car carried no burning headlight. It may be inferred that if it had carried a headlight plaintiff would have discovered it. As it approached plaintiff, when his team was standing and he was looking for it, the side of the

Digitized by Google

car through which light radiated may not have been visible. In the absence of a headlight, it is not certain that he could have distinguished the car, or learned of its approach. Usually, one can see a headlight a long ways in a dark night, and having attentively looked for one, within the range of vision, which is considerable, and discovered none, nor anything else indicating the approach of a car or train, it cannot be said as matter of law that it is negligence to rely upon what the vision has revealed, or failed to reveal. When one can see a light a mile, or for a less but very considerable distance, has looked attentively and discovered no light, he is apt to consider danger from that direction as impossible. Especially would this be true when in proceeding to cross the track the driver is facing, or nearly facing, the direction from which danger is to be apprehended. In a city street, where one car follows another in more or less rapid succession, and in both directions, where vision is limited, prudent men do not, because they reasonably cannot, depend upon anything but attentive and frequent looking in both directions. In the *Colborne Case* it was established that when the driver of the automobile entered upon the track the car was directly upon him; that if he had looked he must have seen the approaching car. See a collection and review of our decisions in *Manos* v. *Railway*, 168 Mich. 155 (130 N. W. 664).

Being of opinion that plaintiff's prudence, or want of it, cannot be determined as matter of law, and that the verdict is supported by testimony which cannot be disregarded, I think the judgment should be affirmed.

Judgment affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

PEACOCK v. STINCHCOMB.

1. WATERS AND WATERCOURSES—ADJACENT LANDOWNERS—FLOODING LANDS.

The right to drain or dispose of surface water on land cannot be exercised by concentrating and pouring it, by means of an artificial ditch or drain, in unusual quantities and velocity greater than would be natural, upon adjacent property.[1]

2. SAME—PRESCRIPTION.

Prescriptive rights can only be exercised in the manner and to the extent that they have been used during the prescriptive period.

3. SAME.

Evidence, in a suit for an injunction to restrain a defendant from maintaining a drain, reviewed, on appeal, and *held*, to warrant the trial court in entering a decree restraining the flowing of complainant's real property.

Appeal from Ionia; Davis, J. Submitted October 14, 1915. (Docket No. 94.) Decided December 21, 1915.

Bill by Thomas L. Peacock against Theseus E. Stinchcomb and another for an injunction. From a decree for complainant, defendants appeal. Affirmed.

Rosslyn L. Sowers, for appellants.

Hawley & Eldred, for appellee.

STONE, J. In this cause the bill of complaint was filed to obtain an injunction restraining defendant Stinchcomb from maintaining a certain drain constructed by him, and from discharging waters through the same upon the lands of the complainant, and re-

[1] On the right to flow of surface water, see note in 21 L. R. A. 593.

On the right to drain surface water into a watercourse, see note in 24 L. R. A. (N. S.) 903.

Digitized by Google

straining each and both of said defendants from constructing any drain upon the lands of defendant Chamblin, whereby the waters from his land would be brought, or carried, therefrom upon the lands of said complainant.

Counsel have not furnished us with any plat or map of the premises involved, rendering it necessary to refer to descriptions thereof and conditions at considerable length.

In 1904 complainant purchased, and at the hearing below was the owner in fee of, the southeast quarter of the southwest quarter of section 35, less 10 acres in the northwest corner thereof, in the township of Sebewa, Ionia county. In 1908 he purchased another 40 acres, being 240 rods long by 26 rods and 11 feet wide, extending from the northeast part of said first-described land north to the north section line of said section. One William F. Sayers had been for 30 years the owner of 80 acres lying immediately east of and adjoining complainant's said land. Extending east and west along the south line of complainant's land, and the land of said Sayers, is a county line road between the counties of Ionia and Eaton. Directly south of and across the said highway from said Sayers' land and in the township of Sunfield, defendant Stinchcomb owns 40 acres of land extending south of said highway a distance of 160 rods, being what may be called "a long 40." He also owns 80 acres of land extending lengthwise west of the south portion of the long 40 above mentioned; his land taken together being an L-shaped parcel. One Mrs. Rumfielt owned 40 acres directly south from complainant's land, and lying between said highway and said 80-acre parcel of defendant Stinchcomb. Monroe Stinchcomb, a brother of defendant Stinchcomb, has for many years owned a parcel of land lying directly east of, and adjoining the long 40 of said defendant Stinchcomb. The right of

Digitized by Google

way of the main line of the Pere Marquette Railroad, from Grand Rapids to Detroit, extends along and adjoins the south line of defendant Stinchcomb's said land, and south of this right of way are the lands of defendant Chamblin.

Complainant's 30-acre lot above described is low land, as is also a part of the 40-acre lot lying north. Said low land is difficult of drainage, and has never been adequately drained. A public drain, known as the Bliss and McClelland drain, was constructed about 30 years ago, and extends for some distance through the township of Sebewa. This drain does not touch complainant's land, and the nearest it comes to it is on the farm adjoining on the west owned by one Lenhart. This drain does not furnish an outlet for the water that accumulates on complainant's low land, nor is it of sufficient depth to afford an outlet to a drain across complainant's low land, adequate to drain the same. After the construction of the Bliss and McClelland drain, and about 28 years ago, several landowners in the neighborhood joined in digging a private drain, commencing at the south side of the county line road, at a point about on the line between the land of complainant and said Sayers, and extending north through a culvert across the road, and thence along said line between complainant's and said Sayers' land, but on said Sayers' side of said land, a distance of about 50 rods. Later this drain was extended by running it thence diagonally in a northwesterly direction to and across the land of complainant and said Lenhart, a distance of about 100 rods, until it intersected said Bliss and McClelland drain on said Lenhart's land. This work was done and said extension constructed by said Sayers and one Halliday, who then owned complainant's 30-acre parcel, and about the year 1896. About the time the ditch was dug from the highway along said Sayers' west line, as above stated, a

Digitized by Google

tile drain was constructed by the Stinchcombs, extending from the culvert across the highway above mentioned along the south side of said highway in an easterly direction about 40 rods to a sag-hole on defendant Stinchcomb's lands, nearly opposite and across the road from said Sayers' residence, where it ended. About the same time, said Sayer constructed a three-inch tile drain extending from a cat-hole on his land in front of Monroe Stinchcomb's house, in a southerly direction to and across the road, where it intersected and emptied into the tile drain last above mentioned. Afterwards, and in the year 1902, Monroe Stinchcomb extended the tile drain above mentioned from the cat-hole on defendant Stinchcomb's land, where it terminated, in a southerly direction across defendant Stinchcomb's land, and upon his own land, a distance of 80 rods. This drain was constructed, in part of 6, in part of 4, and in part of 3 inch tile. It is claimed that an old wooden or puncheon drain had been constructed about 30 years ago, along the same line, but had been filled up and ceased to work at the time of putting in this tile drain.

About 18 or 19 years ago a drain extended westerly from the culvert across said highway above referred to, and along the north side of said Rumfielt land adjacent to the highway, a distance of about 12 rods, then turning to the south, nearly at right angles, was continued a distance of about 50 rods to a piece of woodland on said Rumfielt's land. It was constructed about 2 feet deep to a ravine. It is claimed that the water collected in this ravine, and was thence carried down said ditch to and across said highway and settled on the lands of complainant. Later Asa Stinchcomb, defendant's father, who then owned the land now owned by defendant Stinchcomb and Monroe Stinchcomb, extended a tile drain from the upper end of the Rumfielt drain across the Rumfielt land in a southeast-

Digitized by Google

erly direction about 20 rods; thence east by an open drain, a distance of about 40 rods, and entirely across the lands of defendant Stinchcomb and to and upon the land of Monroe Stinchcomb. The point where this drain crossed the line between the Rumfielt land and the land of defendant Stinchcomb is 65 to 70 rods south of said road, and from thence it runs in a southeasterly direction. About 90 rods south of the road on the long 40 of said defendant Stinchcomb there is a piece of woodland which extends back to the south to within 30 or 40 rods of the south line of said long 40. From the point where the tile drain, last mentioned, reaches the north line of this woodland, an open drain, extending south through the woodland, and through a clearing south thereof, to the south line of this 40-acre parcel, about midway of said land, was afterwards constructed. Its depth at the south line of said 40-acre parcel was only six or eight inches. South of defendant Stinchcomb's long 40 and south of the railroad track, and at a point south of and opposite the terminus of this old drain on the Stinchcomb land, there is a large, deep cat-hole, or pond, on the land of defendant Chamblin, from which pond there is an old drain extending to said Stinchcomb's drain. When the railroad was constructed, a tile was put through the railroad bed to permit the water to flow through from the pond to the said Stinchcomb drain.

From the terminus of the Rumfielt drain, on the Rumfielt land, as above described, defendant Stinchcomb also had another ditch extending to and upon his 80-acre lot, located south of and adjoining the Rumfielt land. After the construction of the Rumfielt drain, and at a point 30 or 40 rods south of the highway, and where it was 15 or 20 rods from said drain to the line, a puncheon drain was constructed from the Rumfielt drain to the Stinchcomb land, but no further. It is the claim of complainant that these several ditches

Digitized by Google

upon the lands of Monroe Stinchcomb, and of the defendants, comprised the system of drainage of lands owned by these parties until the fall of 1913, and that those drains did not afford sufficient drainage for their said lands, and especially for the lands of defendant Stinchcomb, which contained several basins and low places where water collected and stood at times at considerable depth.

It was in evidence that in the fall of 1913 defendant Stinchcomb, without the knowledge or consent of complainant, constructed a new tile drain, extending from the south line of his long 40 northerly, and west of the center line of said 40, to the above-mentioned culvert in the highway, thus discharging the water from said drain to and upon complainant's low lands. This drain is from 4 to 6 feet in depth, except at its commencement and terminus, where it is 30 inches in depth, and the tile that were used were 8-inch tile, except for a distance of about 60 rods at the south end, where 6-inch tile were used. At the time of the construction of this tile drain, two branch tile drains of 4-inch tile were extended easterly therefrom, both located on the north 20 acres of said long 40. One of said branch drains was about 30 rods south from said highway, and the other one about 50 rods south therefrom. Complainant testified that in February, 1914, defendant Chamblin told him that he had agreed to pay defendant Stinchcomb $60, or the difference between 6 and 8-inch tile, for the privilege of an outlet from said Chamblin's land through said tile drain. In their answers both defendants denied any such offer or arrangement, but defendant Chamblin admits in his testimony that there was such a proposition, and that he so told complainant.

It is the claim of the complainant that the effect of this new tile drain was to bring water from the several parcels of land above mentioned in larger quantities,

Digitized by Google

and more rapidly than ever before, upon said low land of complainant, without providing any outlet or drainage for such additional water, to his great damage. This is strenuously denied by the defendants, and may be said to be the main issue in the case. The questions presented by the record are mainly upon the facts. The trial court saw and heard the witnesses testify, and was better able to judge of the credibility of the witnesses whose testimony was conflicting, than we are. A decree was entered for complainant in accordance with the prayer of the bill. Both defendants have appealed. They claim a prescriptive right of flowage, and also that by the new drain the defendant Stinchcomb has not in any manner increased the flow of water from his land to and upon the land of complainant. While there is testimony to support this claim, we gather from the record that the effect, if not the purpose, of the construction of the new tile drain was, and only could be, to rid defendants' lands of the surplus waters accumulated thereon, and to cast such waters upon the lands of complainant, and in larger quantities and much more rapidly than before, thus at times inundating complainant's land.

While one has a right to drain and dispose of the surface water upon his land, yet he cannot lawfully concentrate such water, and pour it through an artificial ditch or drain, in unusual quantities and greater velocity, upon an adjacent proprietor. It is also well-established that a prescriptive right of drainage can only be exercised in the manner and to the extent that it has been used during the prescriptive period, and this rule is applicable here. *Osten* v. *Jerome*, 93 Mich. 196 (53 N. W. 7); *Chapel* v. *Smith*, 80 Mich. 100 (45 N. W. 69); *Bruggink* v. *Thomas*, 125 Mich. 9 (83 N. W. 1019); *Breen* v. *Hyde*, 130 Mich. 1 (89 N. W. 732); *Township of Merritt* v. *Harp*, 131 Mich. 174 (91 N. W. 156); *Id.*, 141 Mich. 233 (104 N. W. 587, 108 N. W.

Digitized by Google

746); *Cranson* v. *Snyder*, 137 Mich. 340 (100 N. W. 674); *Smith* v. *Township of Eaton*, 138 Mich. 511 (101 N. W. 661); *Fraam* v. *Covell*, 170 Mich. 366 (136 N. W. 505).

We are of opinion that the equities of the case are with complainant, and that his claim is not only sustained by a preponderance of the evidence, but is more in accord with reason and the conceded conditions than is that of the defendants.

The decree of the circuit court is affirmed, with costs to complainant.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

SCEBA *v.* MANISTEE RAILWAY CO.

1. EVIDENCE—STREET RAILWAYS—NEGLIGENCE—INFANTS.
   In an action for killing plaintiff's daughter, who was hit by defendant's car at a street crossing, and who was shown to be only five years and three months old at the time of the injury, it was error to exclude interrogatories of plaintiff's attorney as to what was the disposition and tractability of the child and what was the difference between the value of her help and the expenses of clothing and other necessaries; also whether her assistance would grow more valuable as she became older.[1]

2. SAME—VALUE OF SERVICES—MINOR.
   Testimony that tended to throw some light upon what the pecuniary loss resulting from an infant's death might be

[1] On damages in action by parent for death of child, see note in 17 L. R. A. 77.

Digitized by Google

was admissible, and it has been held that some showing of injury or loss must appear.

3. SAME—PRESUMPTION.

The law presumes, in the case of an infant's death by wrongful act, that there has been a loss for which compensation may be given under the statute, and the loss may be estimated from the facts proved, in connection with the knowledge and experience possessed by all persons, in relation to matters of common observation.

4. SAME—DISPOSITION—DAMAGES.

And it was improper to rule out testimony of the child's teacher as to her disposition and habit of obedience, upon the alleged ground that it related to the school only.[1]

5. SAME—DAMAGES—VERDICT.

On error to review the denial of a motion for a new trial, the size of a verdict for plaintiff amounting to $71, covering the evidence relating to funeral and burial expenses only, was not so greatly insufficient as to require the court to reverse the case.

Error to Manistee; Withey, J. Submitted October 18, 1915. (Docket No. 146.) Decided December 21, 1915.

Case by Joseph Sceba, as administrator of the estate of Rosalia Sceba, deceased, against the Manistee Railway Company for the wrongful death of plaintiff's intestate. Judgment for plaintiff for an inadequate amount. Plaintiff brings error. Reversed.

Thomas Smurthwaite, for appellant.

Peter T. Glassmire (*Max E. Neal*, of counsel), for appellee.

STONE, J. This is an action on the case brought under the "Death Act" (3 Comp. Laws, §§ 10427, 10428), to recover damages by reason of an injury resulting in the death of plaintiff's decedent. At the time of the

[1] As to evidence of habits or character of person killed as affecting damages, see note in 1 L. R. A. (N. S.) 198.

Digitized by Google

injury complained of, the defendant owned and operated an electric street railway line in and through the city of Manistee. It was laid upon Eighth street, two blocks, from Kosciusko street on the west, to Vine street on the east. Englemann street crosses Eighth street one block east of Kosciusko street, in a well-settled neighborhood, where there were many people, including children, passing. The closed cars used by the defendant at that time were known as "pay as you enter" cars, and one man performed the duties of conductor and motorman. The plaintiff, with his wife and two children—a boy about seven years old, and Rosalia, a girl aged five years and three months—resided on the east side of Englemann street about 200 feet north of Eighth street. He owned a house and lot there. Plaintiff was a laboring man, and had steady employment only a part of the time. In September, 1914, the child Rosalia began going to school, attending the kindergarten department, located south and west of the home. The usual course traveled by the little girl in going to school was south from the home, crossing the street railway track to the south side of Eighth street, then west one block to Kosciusko street, and thence south one block to the schoolhouse. She usually returned by the same route. Her school hours consisted of the forenoon session only. On October 28, 1914, Rosalia went to school at the usual hour and remained during the session, was released at about 11 o'clock, and started for home. One witness, who saw her, said she was "tripping" along on the sidewalk on the south side of Eighth street. She arrived at the corner of Englemann and Eighth streets, and took a diagonal course from the southwest to the northeast corner. While crossing the track she was overtaken and struck by one of the defendant's east-bound cars, described as above, and was instantly killed. It was a bright, clear day, and there were no objects to prevent

Digitized by Google

a clear view of the situation. The declaration alleged numerous acts of negligence, among them being that defendant failed and neglected to operate its car slowly, and failed and neglected to have its car under proper control, and failed to keep and maintain a diligent outlook for the safety of persons upon said street crossing, and also failed and neglected to use quick stopping devices, and to ring gongs, bells, or other known signals when approaching the said crossing.

The evidence varied as to the speed of the car; the motorman swearing that he was not running to exceed 10 or 12 miles an hour, while another witness testified as follows:

"In my judgment that car which struck this child was traveling at that time at 20 miles an hour, anyway; that would be my best judgment."

We shall not state in detail the evidence relating to the claimed negligence of the defendant, for the reason that the question was submitted to the jury, and they found a verdict for the plaintiff, and the defendant has not appealed.

It is sufficient to say that an examination of the record satisfies us that the question of negligence was one for the jury; and, they having found for the plaintiff, he cannot be heard to complain of the charge upon that branch of the case, the error, if any, being harmless.

Upon the trial of the case it appeared that Rosalia was an active girl, in good physical condition; that the plaintiff was 39 years old; that his father and mother were both living; that the former was 77 and the latter 65 years of age; and that the expenses of the child's funeral and burial were $71, not including the cemetery lot.

The mother of the child, Josephine Sceba, was sworn on behalf of the plaintiff. The following is her testimony, and the rulings of the trial court relating to it:

Digitized by Google

"I am the wife of Joseph Sceba and the mother of Rosa Sceba. I am 28 years old. My father and mother are both living. They live out in the country. My father is 64 years of age and my mother is 59. They are in good health. My health is fine. At the time of her death Rosa was 5 years, 2 months, and about 18 days old. She was born on the 10th day of August, in the year of 1909. Up to the time of her death she had good health.

"*Q.* And what was her disposition as to being kindly, tractable, and obedient?

"*Counsel for Defendant:* We object to that as immaterial and incompetent, and the manner in which the question was asked.

"*The Court:* The objection is sustained.

"*Counsel for Plaintiff:* Note an exception.

"*Counsel for Plaintiff:* I didn't get the ground of the objection or the ruling?

"*The Court:* Well, it simply goes to the measure of damages, and that is what you are after.

"*Counsel for Plaintiff:* Yes.

"*The Court:* And that has no tendency to prove damages or disprove it. It is liable to be prejudiced on that subject.

"*Counsel for Plaintiff:* Well, I will want to ask her some more questions on that line, and I will say to you that in several cases it is held to be competent.

"*The Court:* I think, if you will examine that case, you will find the questions were put in a different aspect.

"*Counsel for Plaintiff:* If it is the form of my question, I would be glad to change that for you.

"*The Court:* You can prove the usefulness of this girl.

"*Counsel for Plaintiff:* That is what I want to do.

"*The Court:* Proceed and do it. It has no tendency to do it the way you put it.

"*Q.* State whether or not, Mrs. Sceba, this child was of a helpful nature?

"*A.* Yes, sir. She was willing to do anything she could do, or help me in any way she could. She was good, and willing to work, and she was always coaxing me to do something, and she would always kiss me after I should tell her to do something, and I al-

Digitized by Google

ways put her at something she could do. That is, quite a bit she could do that I would not have to do.

"*Q.* What, if any, work did you do, other than your housework, to help in supporting the family?

"*A.* Well, in summer I had a garden to take care of, and house work, and in the winter I did sewing and the housework. I had all I wanted to do. It kept me going. Before I was married, my work was farm work. Since I was married, I have had a garden on our own lot. We raised all the vegetables that were used in the house. I raised practically all the vegetables the family needed. Rosa helped me. She would water the cabbage and tomato plants. She would help me weed. She would water the chickens and feed them and gather the eggs. It helped me quite a good deal. I could be at something else, busy, and tell her what she could do. I could depend on her. She was skillful. I made the clothes for myself and children. We had quite a few fruit trees on the lot, and she picked the fruit.

"*Q.* In the manner you have stated, Mrs. Sceba, how would the benefits derived from her work and earnings, done by Rosa for you, compare with the cost of her maintenance?

"*Counsel for Defendant:* We object to that as immaterial and incompetent, as the record now stands.

"*The Court:* I am inclined to think it is incompetent.

"*Counsel for Plaintiff:* Think it is what?

"*The Court:* Incompetent. There is no proof that the lady has ever brought up any other children, or had any experience in that line.

"*Counsel for Plaintiff:* I did not hear.

"*The Court:* There is no proof this lady ever brought up and reared any other child, and no proof along that line, and no proof of experience or knowledge on her part, and you are calling for a conclusion.

"*Counsel for Plaintiff:* On her personal knowledge, she knows what it cost to maintain the child.

"*The Court:* There is no proof she had any knowledge what it cost to maintain the child, or what it would cost.

"*Q.* I will ask that question.

"*Q.* Do you know, Mrs. Sceba, about what it would cost to feed and clothe the child outside of your vegetables?

Digitized by Google

"*Counsel for Defendant:* I also object to that for the reason it is incompetent.

"*The Court:* The objection is sustained. It was all right until you spoiled it.

"*Q.* You have no knowledge of about what it would cost to feed and clothe your daughter?

"*A.* Of course, she could just now about earn her living while she was growing better and healthier, or I mean stronger, with her work that she helped me. I never kept track of what it cost to clothe her. It did not cost very much, because I made all her clothes myself and her hats and bonnets—all except her shoes. Her shoes were about all we had to buy for her.

"*Q.* I will ask you now, how the cost of materials, that you purchased for her food and clothing, would compare with what benefits you derived from her little efforts to help you out?

"*Counsel for Defendant:* We object to that as incompetent the way the record stands.

"*The Court:* I will sustain the objection, for the reason she has already answered the question, and I am doubtful whether it is competent or not. She has already said it was about even.

"*Counsel for Defendant:* I move to have that answer stricken out, if she answered it.

"*Counsel for Plaintiff:* I think it is fairly competent.

"*The Court:* I will let it stand for the time being, but it is pretty close to the line.

"*Q.* Now, Mrs. Sceba, with your knowledge of the disposition of Rosa, you can state whether or not her efforts in that behalf, and the benefits that were derived from her services, would increase or diminish?

"*Counsel for Defendant:* I object to that as incompetent.

"*The Court:* The objection is sustained. I think it is a question for the jury.

"*Counsel for Plaintiff:* Give me an exception.

"*A.* Rosa was of medium size for her age. I did not work out for other people at any other work except sewing.

"*Q.* State whether or not you have had opportunity to work out to any greater extent as this child grew older?

"*Counsel for Defendant:* We object to that as incompetent and immaterial.

Digitized by Google

"*The Court:* I think so. It calls for a conclusion based upon the future, of which she could have no knowledge, from the evidence already in, and which may hereafter be put in the case. In other words, I think to admit that line of proof would be an invasion of the province of the jury.

"*Counsel for Plaintiff:* There are two classes of cases in Michigan on that subject. * * * (Here followed a discussion of the Michigan cases herein referred to.)

"*The Court:* I am trying to rule right along the other case you are talking about.

"*Counsel for Plaintiff:* If your honor is aware of the case, I have nothing further to say.

"*The Court:* I don't think there is anything in that case that would admit the proof I have ruled out.

"*Counsel for Plaintiff:* Under the prior case it was.

"*The Court:* I do not know any case it was.

"*Counsel for Plaintiff:* I think they have got that pretty well down to solid rock, when they state the jury was as good a judge as the parents or anybody else. That is all of this witness. You may cross-examine."

Cross-Examination: "Our little girl first began going to school the beginning of September, 1914. She was in the kindergarten. Miss Lorenz was her teacher.

"*The Court:* I think, in order to make this record safe, I will strike from the record the testimony of this witness of what the child earned and expenses of maintenance, as about equal. That is the substance or gist of what she said. I will strike it out. It calls for a conclusion, and it calls for simply the sentiment of this mother, as to the value of the services of this little girl. There is nothing to base it upon. She has given her testimony, and she has nothing upon which she can make that assertion. It is for the jury to say, and not for her to say. It can be stricken out.

"*Counsel for Plaintiff:* Note an exception."

The case was submitted to the jury, and the trial resulted in a verdict for the plaintiff in the sum of $71.

In the course of its charge to the jury the court instructed them that if they found for the plaintiff, and found that the services of the child during her minority would have exceeded the cost of her maintenance,

Digitized by Google

then the father was entitled to recover that amount, whatever they found it to be; that in passing upon that question they should take into consideration the probabilities of the life of the child and the probabilities of the lives of the parents; and the attention of the jury was called to the length of the lives of the grandparents, and of the father and mother of the child, and of the state of health of the grandparents and of the father and mother, and of the state of health of the child at the time of her death. The court said:

"All these things you are to take into consideration in passing upon this subject. If you find for the plaintiff, if he is entitled to recover anything, he shall recover the cost of the burial, of the child, the amount of which has been testified in the evidence and is uncontradicted—$71. * * *

"The law says that you are to give fair and just compensation to these parents and this father, the plaintiff in the case, if you find for the plaintiff, in regard to his pecuniary loss, and nothing else at all.

"Counsel has made some figures in your presence. They are not controlling upon you, and they were permitted, simply as a part of his argument, and the deductions he makes, or seeks to make, from the proofs in the case. It is your province to say finally what has been proven in the case, and what the damages are, if there are any over and above the $71.

"So I say to you finally and briefly that if you find the defendant's negligence has been established, on any of these declared heads, in the manner I have suggested, your verdict will be for the plaintiff. * * *

"If you find for the plaintiff, he is entitled to receive at least $71, the cost of the burial of the little girl. If you find he has suffered a pecuniary loss because of her premature and early death, then he is entitled, in addition to the $71, to whatever you may fairly and justly find on that head, taking into consideration all the evidence in the case."

There was a motion for a new trial, based upon the grounds, among others, that the verdict was wholly inconsistent, unjust, and contrary to law, and that the damages awarded were wholly inadequate.

Digitized by Google

In his reasons for the denial of the motion for a new trial, the circuit judge, among other things, said:

"It is true that a verdict like this shocks the sense of mankind, but that is because we have a sympathy which the law absolutely prohibits the jury from indulging in, or the court either. In my opinion, the law should permit damages for grief and sorrow, and then there would be damages of a substantial and tangible kind. My understanding is, the lawmakers refuse to indulge that, because it has been said by some writers that that would put a premium on the death of the child and jeopardize its life in very many cases; and that is probably true, nevertheless, so long as the law is as it is, and makes it purely and solely a question of pecuniary loss or profits, I think the verdict is right. I think that is the view the jury took of it. I made that plain to them, or tried to—that they could not indulge in either sympathy or prejudice, and that it was simply a matter of dollars and cents. There were men on that jury who know, I am sure, that to rear a girl from the cradle to her legal majority is an expensive proposition. Of course, it is not as expensive among the laboring classes, but there were members of that class on the jury, and they know. And the peculiar thing about it is that the latest decisions on that subject leave the whole question of damages or lack of it to the judgment of the jury, regardless of the proof. To my mind, that is a perversion of every principle of the law, but if it is the law, and is to obtain as the law, then this court has no right to enter the jury box and say that they are mistaken in their judgment, because it is their judgment and nothing else, and it is based upon nothing. There wasn't a word of proof in the case as to what it cost to maintain this child, or any other child, or what it could earn, or what any other child could earn. There was some proof—a little— as to what the child did. And I say, if that is the law, then I have no right to meddle with this verdict at all, on this ground."

A judgment was entered in accordance with the verdict, and the plaintiff has brought the case here upon a writ of error, and there are 29 assignments of error. Many of these relate to the question of negligence, and,

Digitized by Google

for the reason already stated, will not be considered by us. The assignments of error relating to the question of damages were:

(2) That the court erred in sustaining the objection of counsel for defendant to the following question put to Josephine Sceba on direct examination: "What was her disposition as to being kindly, tractable, and obedient?"

(3) Also, in sustaining the objection of counsel for defendant to the following question asked Josephine Sceba: "Q. I will ask you now how the cost of the materials, that you purchased for the food and clothing, would compare with the benefits you derived from her little efforts to help you?"

(4) Also, in sustaining the objection to the following question: "Q. Now, Mrs. Sceba, with your knowledge of the disposition of Rosa, you can state whether or not her efforts in that behalf, and the benefits that were derived from her services, would increase or diminish?"

(5) Also, in sustaining a like objection to the following question: "Q. State whether or not you would have had opportunity to work out, to any greater extent, as this child grew older?"

(6) That the court erred in ruling upon its own motion in striking certain of the testimony of Josephine Sceba from the record, as above set forth.

(7) That the court erred in sustaining the objection of counsel for defendant to the following question asked Nina Lorenz: "Q. What was her disposition, Miss Lorenz, as to being an obedient child?"

The twenty-third assignment of error is to the effect that the court in its charge to the jury erred, in that the cost of the burial was emphasized, and practically and in effect made the sole basis of damages, if the jury should find for the plaintiff. The twenty-fifth, twenty-sixth, and twenty-seventh assignments of error are based upon the portion of the charge above set forth. The twenty-eighth assignment of error is to the effect that the court erred, in that it did not instruct the jury as to the proper and lawful manner of comput-

Digitized by Google

ing the damages, or as to the elements of damages to the plaintiff, if the jury should find the defendant negligent as charged, which caused the death of Rosalia Sceba. The twenty-ninth assignment of error is to the effect that the court erred in denying the motion of plaintiff to set aside the verdict of the jury and the judgment entered thereon, and to grant a new trial for the reasons set forth in said motion. The second, third, fourth, fifth, and sixth assignments of error will be considered together. We note the fact that the ruling upon which error is assigned in the third and fifth assignments of error, do not appear to have been excepted to, but the ruling of the court in striking from the record certain testimony covered by the sixth assignment of error was duly excepted to.

A careful perusal of this record has satisfied us that there was prejudicial error in the rulings of the court relating to the testimony of Josephine Sceba. In the earlier cases of *Cooper* v. *Railway Co.*, 66 Mich. 261 (33 N. W. 306); *Rajnowski* v. *Railroad Co.*, 74 Mich. 20 (41 N. W. 849); *Hurst* v. *Railway*, 84 Mich. 539 (48 N. W. 44); *Charlebois* v. *Railroad Co.*, 91 Mich. 59 (51 N. W. 812); and *Snyder* v. *Railway Co.*, 131 Mich. 418 (91 N. W. 643)—it was the practice to offer testimony generally, consisting of the judgment or opinion of witnesses as to the probable earnings, on the one hand, and cost or expense of rearing a child until majority, upon the other; and it was held that testimony, throwing any light upon what the pecuniary injury resulting from death would be, was admissible. And in the *Hurst Case* this court said:

"Some pecuniary injury or loss must be shown by the evidence."

In the *Charlebois Case* it was said that the plaintiff must show that some person had suffered some pecuniary injury by the death, and that the statute did not imply that damages and pecuniary loss necessarily fol-

Digitized by Google

lowed from the negligent killing. In the *Rajnowski Case*, it was held that:

"The testimony of witnesses who are shown by their knowledge or experience to be qualified to express an opinion upon the pecuniary value of such a life is admissible, not for the purpose of controlling, but of aiding, the jury in arriving at a just conclusion."

In the *Cooper Case* a judgment of $1,550 upon the death of a girl 11 years of age was sustained; and it was held that the jury could not give damages founded upon their fancy, or based upon visionary estimates of probabilities or chances. In the *Snyder Case* the action of the lower court in refusing to set aside, as inadequate, a verdict of $250 for negligently causing the death of a boy between 11 and 12 years old, was sustained.

In the case of *Black* v. *Railroad Co.*, 146 Mich. 568 (109 N. W. 1052), this court did not hold that such evidence, as above referred to, was not admissible, but did hold that where evidence had been given as to the age, calling, and condition of health of the father, and of the age and condition of the mother, together with evidence that the child was healthy, intelligent, of a good disposition, and obedient to its parents, that was sufficient to authorize an award of substantial damages, and the court, in that case, refused to set aside a verdict of $1,500 damages. Justice MOORE, who wrote the opinion of the court, after quoting the reasons of the circuit judge in his denial of a motion for a new trial, and after calling attention to the cases of *Parsons* v. *Railway Co.*, 94 Mo. 286 (6 S. W. 464), and *City of Chicago* v. *Hesing*, 83 Ill. 204 (25 Am. Rep. 378), and other authorities, concluded his opinion in these words:

"The jurors have all been boys. The average juror knows the conditions which surround a boy in a family like that of plaintiff. We think it cannot be said, as

Digitized by Google

a matter of law, that there was no basis upon which to find a verdict for pecuniary loss."

This case has since been cited with approval.

Applying either rule of evidence, as indicated by the above-named cases, we think the ruling of the trial court was prejudicially erroneous in refusing to permit Josephine Sceba to answer the question, "What was her disposition as to being kindly, tractable, and obedient?" and the question covered by the fourth assignment of error, and in striking out the testimony referred to by the court, covered by the sixth assignment of error. It is no answer to say that the mother did not testify in dollars and cents as to the value of the child's earnings, or the expense of maintenance. She had testified generally, as to the nature and extent of those services, and the expense she had been put to in clothing the child. Her opinion or judgment, whether the child's efforts, and the benefits derived from her services, would in the future increase or diminish, was admissible. We think she was competent to testify upon that subject. Such testimony would not be mere speculation, conclusion, or sentiment, but would have had a tendency to prove pecuniary damage. By the rulings above referred to, the jury were deprived of testimony which would probably have aided them in reaching a substantial verdict in the case.

In denying the motion for a new trial, the trial judge said:

"There wasn't a word of proof in the case as to what it would cost to maintain this child, or any other child, or what it could earn, or what any other child could earn. There was some proof—a little—as to what the child did."

In our opinion, the principal reason why there was no evidence upon those subjects was because of the ad-

Digitized by Google

verse rulings of the court in dealing with the testimony of Josephine Sceba. The infirmity in the charge of the court was that having erroneously narrowed the subject of the inquiry of the jury, by the rulings above referred to, the doctrine of the *Black Case* was not referred to, but was wholly ignored; so that the jury had no basis for the assessment of damages beyond the funeral expenses. We note the fact, however, that the plaintiff did not present any requests to charge, upon this subject, and we should hesitate to reverse the case upon the charge alone.

It has been held by many courts, including those cited in the *Black Case*, that the law presumes, in the case of the death of a minor child by wrongful act, that there has been a loss for which compensation may be given under the statute, and that the loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons, in relation to matters of common observation. 8 R. C. L. p. 835, citing many cases. While the verdict appears to have shocked the sense of the trial judge, had there been no errors in the rulings and charge, as indicated, we should not feel like holding that the damages awarded were wholly inadequate as matter of law. But we are satisfied that the amount of the verdict was the result of the errors above pointed out, and that the jury were too much circumscribed in their inquiry by the rulings and charge.

The witness Nina Lorenz, the teacher of the child, was asked a question, above referred to, which, being objected to as incompetent and immaterial, the court excluded, using the language, "Sustained so far as school is concerned," to which ruling plaintiff's counsel excepted. We hardly understand the purport of this ruling. We think it was competent for this witness, or any other person acquainted with the child, to testify to her disposition and habits of obedience. The

Digitized by Google

record shows, however, that this witness later gave testimony as to the general disposition of the child, and we only refer to this ruling because it was consistent with other rulings which narrowed the scope of the jury's inquiry, and led to the verdict and judgment in the case.

For the errors pointed out, the judgment of the court below is reversed, and a new trial granted.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

POSS v. MEADER.

1. BILLS AND NOTES—BONA FIDE HOLDER—EVIDENCE.

In an action on a promissory note, given for a motor truck which proved defective, the plaintiff, who was president of the payee, and who took the notes as payment upon advances that he had made to the corporation, was entitled to a directed verdict, as a holder in due course, upon uncontradicted evidence showing that plaintiff caused them to be sent to his brother-in-law, the secretary of the company, for collection; that the latter acted in plaintiff's behalf and was not acting for the corporation, though plaintiff testified that the said secretary had told him that the notes were at the factory and had mentioned his official connection with the payee.[1]

[1]Whether an officer or employee of corporation is chargeable with its knowledge of infirmities in commercial paper purchased from it is discussed in notes in 48 L. R. A. (N. S.) 65, L. R. A. 1915D, 1099.

Digitized by Google

2. SAME—NOTICE.

Any notice that may have come to plaintiff of the existence of a contract between the payee and maker of the note was insufficient to charge him with notice of breach of the contract of warranty. And the fact that he was president of the corporation does not affect the application of the rule.

3. SAME—HEARSAY—AGENCY.

It was error to admit in evidence statements claimed to have been made by the corporate secretary to defendant relating to the time when plaintiff purchased the notes, to charge him with notice of alleged defects.

Error to Wayne; Hally, J. Submitted October 15, 1915. (Docket No. 114.) Decided December 21, 1915.

Assumpsit by Frank R. Poss, in justice's court, against Squire M. Meader on certain promissory notes. From a judgment for plaintiff defendant appealed to the circuit court. Judgment for defendant. Plaintiff brings error. Reversed.

Corliss, Leete & Moody, for appellant.

Frank C. Golden, for appellee.

STONE, J. This suit was brought by the plaintiff as the indorsee and holder, against the defendant, as maker, of seven promissory notes for $50 each, dated August 31, 1912, due in successive months after date, being seven out of twelve promissory notes, given by the defendant to the Poss Motor Company, a Michigan corporation, in part payment of the purchase price of a second-hand automobile truck, manufactured by said company; the total purchase price being $800. The suit originated in justice's court. The plaintiff declared on all the common counts, and especially upon said promissory notes. The notes were alike in form, except as to date of maturity. The first note read as follows:

Digitized by Google

"$50.00. DETROIT, MICH., Aug. 31, 1912.
"September 30, 1912, after date, I promise to pay to the order of Poss Motor Company fifty dollars at the First National Bank of Detroit. Value received. Int. 6% per annum. S. M. MEADER."
Indorsements:

"POSS MOTOR CO.,
"By R. R. MCKINLEY, Treas.
"F. R. POSS."

Under the plea of the general issue, the defendant gave notice of "an absolute failure of consideration, in that the car was absolutely useless," and of breach of "express and implied warranty of said car," and that plaintiff, "as assignee or indorsee of said notes, took the same with full knowledge of failure of consideration as aforesaid, and that the said plaintiff is not a holder in due course."

Upon the trial in the circuit court the several notes were produced, and one of plaintiff's attorneys testified to the indorsement of the Poss Motor Company, by R. R. McKinley, Treas., and that the first note came into his hands in behalf of the plaintiff, from the First National Bank of Detroit, as nearly as he could recall it, within a week or so after it became due, and he thought before the second note became due; and that the other notes came to his hands from the same bank, in each case after they became due and were dishonored, under instructions from Mr. Poss to the bank, after the first note was dishonored, to deliver them to him from time to time after they became due. Witness further testified to the amount due. The notes were then received in evidence, and the plaintiff rested.

Thereupon the defendant called as a witness Robert R. McKinley, who testified that he was at the time of the making of the notes the treasurer and secretary of the Poss Motor Company; that the plaintiff was the president of the said company; that the witness was the brother-in-law of the plaintiff; and that the notes sued upon were turned over to Mr. Poss as payment on

Digitized by Google

a loan that he made to the company, immediately after the notes were given. He further testified on direct examination as follows:

"*Q.* Did they ever come back into your possession, or the possession of the Poss Motor Company?

"*A.* It seems to me that Mr. Poss gave me the note, or told me to write to Mr. Meader. At that time I did considerable of Mr. Poss' business, owing to the fact that he was out of the city a good deal. I do not just recall whether I notified Mr. Meader that the note was due, or not. It seems to me I did. They did not come back into the possession of the Poss Motor Company; no, sir.

"*Q.* Now, your possession, how about that?

"*A.* He may have given me the note to try to collect. As I recollect, he did. * * He would probably go away once a month for a week or ten days. During those periods that he was away, I transacted a portion of his business for him. That was during all the time that the Poss Motor Company was in existence, and I was acting as the secretary and treasurer. While he was here, he was not there in active management of the Poss Motor Company, he had no office there, his office was in the Penobscot building. He left the Poss Motor Company business to the officers of the company, general manager principally. In so far as his personal, private dealings with the Poss Motor Company were concerned, he left them to me, in some cases, I might say in quite the majority; yes, sir. I do not recall that I called on Mr. Meader about the 5th of November, 1912. I would not say that I did not call on him. I believe I did make one trip over there. I do not remember the date. That was not as a representative of the Poss Motor Company; that was for Mr. Poss. I do not recall whether it was one or two notes that were due then. I presume I requested him to pay them at that time. I do not recollect him asking me where the notes were at that time. I would not say that he did not ask me. I do not recollect stating to him that they were over in the Poss Motor Company's office. I would not state that I did not state that to him."

On cross-examination, he testified:

Digitized by Google

"Q. Mr. McKinley, there isn't any question, is there, that these notes were indorsed and delivered to Mr. Poss, either on the same day they were made, or within a day or two thereafter?

"A. No, sir.

"Q. For money which he had before advanced, or was then advancing?

"A. Money which he had advanced just about that time.

"Q. Didn't he advance one note of $2,500 just at the time of this transaction?

"A. Just about that time; yes, sir. I think I stated it was within a few days before or about that time. There were some other notes of some other purchaser at the same time, Dixie Laundry Company and others, given to him. * * *

"Q. Those notes were indorsed by him after they were assigned to him, and before they were in the First National Bank, for collection, were they not?

"A. Yes, sir.

"Q. And if you had a note or notes to present, you got them from the First National Bank, didn't you?

"A. Yes. * * * I was acting for Mr. Poss at the time when I presented this note, or the notes—if there were two—to Mr. Meader."

On redirect examination, he testified:

"Q. When you got notes from Mr. Poss to present to the makers for payment, you did it in that capacity, that you were acting for him as a private friend and relation, did you not?

"A. Certainly."

There was no testimony which in any way contradicted or modified this testimony of Mr. McKinley, except the following testimony of the defendant, which was received over the objection and exception of plaintiff, to wit:

"Q. Were you ever requested to pay that note, or any other one of these notes, after that? (Referring to a conversation with Mr. Wilson, the sales agent from whom he got the car.)

Digitized by Google

"*A.* Yes, sir; that was not until November, I think, something from the 10th to the 15th, something along there, I do not know exactly, November, 1912, Mr. McKinley, the secretary and treasurer of the Poss Motor Company, came to see me about them then. He told me at that time that he was secretary and treasurer. That is all I know, I did not know it. At the time he visited my place of business, he introduced himself as such. I did not see the notes there. I asked him where the notes were, and he said—I think he said they were to the Poss factory, at the factory."

The defendant gave testimony at great length relating to the trouble which he had with the car, and tending to show that it was worthless, and that there was a total want of consideration for the notes. This evidence was received against the objection of plaintiff that it was immaterial, and irrelevant, and its admission was excepted to.

At the close of the testimony, the plaintiff requested the court to direct a verdict in his favor, which request was denied.

The court, in its charge to the jury, after reading sections 54, 58, and 59 of the negotiable instruments law (Act No. 265, Pub. Acts 1905), charged as follows:

"Now, gentlemen of the jury, the defendant asks me to charge, and I do charge you, if you find from the evidence that the plaintiff, Frank R. Poss, had no notice of the failure of the consideration for which the notes were given, constructive or actual, you shall find that he was a holder in due course and not subject to the defense of failure of consideration. (In this connection you are charged that it is not necessary that the holder of a negotiable note should have actual notice, but that such notice may be constructive notice; and you are instructed constructive notice may be such notice as would naturally arise from the relation of the holder to the indorser and all the other circumstances governing the transfer of the notes.) (You are further instructed that if you find from the evidence that the

Digitized by Google

plaintiff, Frank R. Poss, had notice, actual or constructive, of the failure of consideration for which those notes were given, you shall find that he was not a *bona fide* holder in due course, and you shall further find that he holds said notes subject to all defenses that might have been made or may be made, against the Poss Motor Company, payee in those notes.) (If you shall find that Frank R. Poss was not a *bona fide* holder, that is, a holder in good faith, without notice, and you should further find that there was a failure of the consideration, that is, that the article for which these notes were given did not possess the merit that it was represented by the vendor to possess and that it did not do the work that the defendant purchased it to do, your verdict should be no cause of action.) Now, there is one exception which I desire to put to that last request, which I think you have a right to take into consideration. You will notice that it says 'If you shall find that Frank R. Poss was not a *bona fide* holder, that is, a holder in good faith without notice, and you should further find that there was a failure of the consideration, that is, that the article for which these notes were given did not possess the merit that it was represented by the vendor to possess and that it did not do the work that the defendant purchased it to do, your verdict should be no cause of action.' You have no right to reach a verdict for no cause of action under that charge unless you also find that the trial given by the defendant of this article was a reasonable trial, and you have no right to reach that either unless you also find that this article was turned back to the company, and it being turned back to the company was acquiesced in by the company, and that all of these things transpired, you see, to the knowledge of Mr. Poss, and before Mr. Poss became possessor of the notes, because if Mr. Poss in due course became possessor of the notes before any of these things came into existence and had paid value for them before that time, what happened subsequently to that time, even though it did reach the knowledge of Mr. Poss, would not make him a holder in bad faith, or would not constitute him a holder in such a way that he would be charged with these things that transpired after he became possessed of the notes.

Digitized by Google

"Now, on the part of the plaintiff, it is said to you here that these notes were indorsed over to Mr. Poss one or two days after they were made. Upon the part of the defendant it is said to you here that some time in November Mr. McKinley, in paying a visit to the defendant, asked him at that time, not on behalf of Mr. Poss, but on behalf of the Poss Motor Company, to pay the notes that he had given for this car. * * *

"Now, there is only one thing that I desire to charge you upon, and that is this: Certain testimony has been given here of the relationship which existed between these parties. I do not know of any one feature of the testimony, you see, which is disputed concerning Mr. Poss, Mr. Poss' holdings in this company, his official connection with the company, his blood or affinity relation with the secretary and treasurer of the company. Now, those set of facts, or this set of facts rather, not being disputed, the question arises: Does that present a settled legal situation? I think it does present a settled legal situation. That legal situation is this: That if Mr. Poss did not know of this contract and of the notes which were given in connection with this contract, he is in law bound to know of this contract and of the fact that these notes were given in connection with this contract. Now, even though he did know that, you understand, if immediately after that the notes came to his possession, he would still be a holder in good faith, unless you find that these notes did not come into his possession until some time in November, according to the testimony of Mr. Meader."

The trial resulted in a verdict and judgment for the defendant, and the plaintiff has brought the case here for review. Errors are assigned as follows:

(1) Because the court refused to direct a verdict for plaintiff.

(2) Because of the admission of evidence as to an alleged failure of consideration for the notes sued upon.

(3) Because the court erred in admitting the testimony of defendant as to a conversation between himself and the witness McKinley, above referred to.

(4, 5, 6) Because the court charged the jury in the language embraced in the parentheses.

(8) In permitting the jury to find, in the absence

Digitized by Google

of any competent evidence, that the notes came into the hands of the plaintiff in November.

(10) In submitting to the jury, as evidence of the time when the notes came into the possession of plaintiff, the testimony of defendant as to the conversation had with the witness McKinley.

1. In our opinion, in the state of the record at the close of the testimony, the plaintiff was entitled to a directed verdict. At the time when by the undisputed evidence the notes were negotiated to the plaintiff, he had no notice of any infirmity in the instruments, or defect in the title of the party negotiating them. In fact, there was no evidence that there was any infirmity in the instruments, or defect in the title of the payee. If plaintiff had notice or knowledge that a contract, as the basis of said notes, existed, that would be no defense unless he also had notice, at the time he bought the notes, that there had been a breach of the contract, of which there was no evidence. *Hakes* v. *Thayer*, 165 Mich. 476-489 (131 N. W. 174). Nor would the fact that plaintiff was the president of the company, the payee of the notes, change the application of the rule.

2. We are of the opinion that the trial court erred in permitting the defendant to testify to the conversation between himself and the witness McKinley, and to the statement of said McKinley which was excepted to, and in submitting such testimony to the jury as substantive evidence of the time when the notes were purchased by the plaintiff.

We think that the errors above pointed out were prejudicial to the rights of the plaintiff, and were probably controlling of the verdict.

The judgment of the circuit court is therefore reversed, and a new trial granted.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

HICKS *v.* FINBARG.

1. MECHANIC'S LIENS—DESCRIPTION OF REAL PROPERTY—NOTICE OF CLAIM.

   A verified notice of mechanic's lien claimed by a contractor, describing the property as the "W ½ of lot 12, which lies across Main street in the village of C. from the property owned by ——— and between said Main street and the D. & M. Railway Company right of way and lies right west of lots 12 and 13, and the E ½ of lot 11 in said village of C. owned and occupied by this affiant," sufficiently described the premises on which complainant constructed a cement wall and cellar to create a valid lien, the correct description being lots 11 and 12, block 2, Hosmer & Earl's Addition to the village of C., excepting therefrom 40 feet off the east side of said lot 12; where the contestant had accepted a mortgage with knowledge that the construction work was in progress and where the mortgage described the property correctly. See 3 Comp. Laws, § 10714.

2. SAME—CONVEYANCING.

   False and impossible parts of descriptions in conveyances may be rejected, when by doing so a good description remains.

3. SAME—IDENTITY—INITIAL.

   The objection that the owner's name was given as M. Finbarg, instead of giving in full the Christian name of the party was not fatal to the lien, in the absence of a dispute concerning his identity.

Appeal from Ottawa; Cross, J. Submitted October 22, 1915. (Docket No. 169.) Decided December 21, 1915.

Bill by Art Hicks against Meyer Finbarg and the People's Savings Bank for the enforcement of a mechanic's lien. From a decree for complainant, defendant bank appeals. Affirmed.

Digitized by Google

Lillie, Lillie & Lillie, for complainant.
Dean S. Face, for defendant bank.

STONE, J. The bill of complaint herein was filed to enforce a mechanic's lien. The question involved seems to be as to the sufficiency of the description of the premises contained in the statement of lien filed, as affecting the defendant People's Savings Bank, which alone has appealed from the decree below.

From the statement of facts, in lieu of evidence, contained in the record, we gather the following facts:

On October 27, 1913, the defendant Meyer Finbarg was the owner of a piece of land described as lots 11 and 12, of block 2, of Hosmer & Earl's addition to the village of Coopersville, Ottawa county, Mich., except therefrom 40 feet off the east side of said lot 12. On that date the complainant and the defendant Finbarg made and entered into the following written contract, viz.:

"It is agreed between M. Finbarg, party of the first part, and Art Hicks, party of the second part, that the party of the second part will build, and furnish all material, a cement building and basement of the following size, 35x35 feet, 10 feet high in front and 8 in rear, cellar must be 7 feet deep in the clear, have a cement floor three inches thick, cement supporters for upper floor made of blocks, walls to be made of cement blocks above the ground and four feet of concrete in the ground, sidewalk in front of building and in rear of building, five feet wide by thirty-five feet for rear sidewalk, and front sidewalk 2 feet wide by 35 feet. Also a tile shall be laid from cellar to sewer of 6 in. tile. Also a chimney shall be built, flue 10 in. by 10 in., 22 feet high. Then cement steps shall be built in front of building 2 feet wide, also wooden frames will be put up on place by party of the second part. The party of the first part agrees to pay four hundred and fifty dollars upon completion of work.

[Signed]

"ART HICKS.
"M. FINBARG."

Digitized by Google

This agreement was drafted by a Mr. Ter Avest, the cashier of the said People's Savings Bank, defendant herein, and was signed by the parties thereto, within the knowledge of the said cashier.

Immediatetly after the execution of said contract, the complainant commenced to construct a building as described in the contract, upon a part of the piece of land above described. The construction work was continued with certain temporary interruptions from October 27, 1913, until March 30, 1914. There was standing upon a part of said piece of land, at the time of the execution of said contract, an old building of frame construction. Previous to December 10, 1913, the complainant constructed a wall under said old building. On said last-named date the parties to the original contract made a further agreement in writing, on the back of the paper on which the first contract was written, in the following words:

"Dec. 10, 1913.

"Upon completion of the building according to this contract, M. Finbarg agrees to pay forty-five (45) dollars, in addition to contract price, for putting wall under old building belonging to him. Building to be completed in reasonable time.

"M. FINBARG.
"ART HICKS."

The land owned by defendant Meyer Finbarg consists of the lot, and part of a lot above described. This land lies across the street from a piece of land owned by Frank Hedges, and is between the street, called Main street, and the railroad known as the "D. & M." Lots 11 and 12 are 50 feet wide, respectively, and the lots in block 2 of Hosmer & Earl's addition are numbered in order from the west toward the east, thus, 10, 11, 12, 13, No. 13 being farthest east. Lots 13 and that part of lot 12, which was not owned by defendant Finbarg, were and are owned and occupied by the com-

Digitized by Google

plainant. The buildings are actually located upon said land as follows: The new building constructed by the complainant begins at the east line of Finbarg's land, and extends westward 35 feet, so that its west wall touches the east wall of said old building, under which the new wall was built as above mentioned. The old building extends from that line west to the west line of the property belonging to defendant Finbarg.

On January 13, 1914, the owner, Meyer Finbarg, executed a mortgage to the defendant People's Savings Bank, of Coopersville, Mich., for the sum of $1,000, covering the property described in the first paragraph of said statement of facts, which was recorded in the office of the register of deeds of said county on the following day. This mortgage was executed after the complainant had begun work upon the buildings. As a result of the construction of said new building, and the wall under the old building, in pursuance of said agreements, and after the payment of certain sums by said defendant Finbarg to complainant, there was due to said complainant from said defendant Finbarg, on April 23, 1914, the sum of $207, which was, and is still, unpaid. The last of the work, and materials furnished by said complainant, were on March 30, 1914. On the 23d day of April, 1914, the complainant made and filed with the register of deeds of said county a verified statement and notice of his lien, in which the premises were described as follows:

"And that the premises are described as the west one-half of lot twelve, which lies across Main street in the village of Coopersville, from the property owned by Frank Hedges, and between said Main street and the D. & M. Railway Company right of way, and lies right west of lots twelve and thirteen, and the east one-half of lot eleven, in said village of Coopersville, owned and occupied by this affiant."

In another part of said statement of lien the old

Digitized by Google

building is referred to as an "old building belonging to Finbarg."

The trial court found for the complainant for the amount claimed by him, and that the same was a lien on the premises described in the notice of lien, and that said bank knew of the work and the construction of said new building at the time said mortgage was taken, and that said mortgage lien would be a subsequent lien to complainant's lien for the work and material done on said building.

"And it is further found that the land described in said mortgage from said Finbarg to said People's Savings Bank of the village of Coopersville, Mich., is as follows: Lots 11 and 12, block 2, Hosmer and Earle's addition to the village of Coopersville, excepting therefrom 40 feet off the east side of said lot 12; and that Finbarg and People's Savings Bank understood and knew that the building that said complainant so built for said defendant Finbarg was on the land described in said mortgage, and that the same is, in fact, the land described in the notice of lien, although described in different words and figures."

Upon this appeal it is the claim of the complainant that the description in the statement and notice of lien is sufficient to locate the land on which the building was erected, and is sufficient for the purpose of a lien. On the other hand, it is the claim of appellant that the statement is insufficient in the following particulars:

(1) The description of the premises therein fails to identify any land or property whatever, and is void.

(2) The name of the owner of the premises supposed to be charged with a lien is not correctly given.

Counsel for appellant calls attention to the language of the statute (section 10714, 3 Comp. Laws), which provides that the statement filed with the register of deeds shall contain "a correct description" of the property to be charged with the lien. He does not claim

Digitized by Google

that a description under this statute must follow any prescribed form of words, or that it must follow any description which had been previously used, but that it must identify some certain premises; in other words, that the premises must be identified by the description used, although external evidence may be used in applying the description. Counsel refers to *Sheldon, Kamm & Co.* v. *Bremer,* 166 Mich. 578 (132 N. W. 117), wherein we held that mechanics' liens rest in strict right, not upon mere equities. It is also urged that the finding of the lower court upon the subject of description was not supported by any evidence. It was stipulated by counsel that the "statement of facts" in the record should be received by this court "with the same effect as a transcript of the evidence in said suit duly settled and certified by the circuit judge." Turning to such statement, we first find a correct description of the premises, as contained in appellant's mortgage. We further find that:

"Immediately after the execution of said contract, the complainant commenced to construct a building as described in the contract upon a part of the piece of land above described."

Also:

"There was standing upon a part of said piece of land at the time of the execution of said contract, an old building of frame construction."

It further appears as a fact that the land owned by defendant Finbarg

"lies across the street from a piece of land owned by Frank Hedges, and is between the street called Main street, and the railroad known as the 'D. & M.' Lots 11 and 12 are 50 feet wide, respectively, and the lots in block 2 of Hosmer & Earl's addition are numbered in order from the west toward the east, thus, 10, 11, 12, and 13 from the west, No. 13 being farthest east. Lot 13 and that part of lot 12 which was not owned

Digitized by Google

by Finbarg were and are owned and occupied by the complainant, Art Hicks."

Applying the rule as stated by counsel for appellant that, "to constitute a valid lien under the statute, the lot or land on which the building is situated should be described with such certainty that it may be definitely ascertained and located," the pertinent question is whether there was sufficient evidence to support the finding, that "the land described in said mortgage is in fact the land described in the notice of lien, although described in different words and figures."

We are of the opinion that, although the description in the statement and notice of lien was ambiguous, yet that there was sufficient evidence to identify it as the same land as that described in the mortgage. In addition to what has been already stated, it appeared that the land owned by defendant Finbarg was across the street from a piece of land owned by Frank Hedges, was between the street called Main street and the railroad known as the "D. & M.," and was bounded on the east by land owned and occupied by the complainant. Is there any doubt that the premises described in the statement and notice of lien, in the light of this record, could be definitely ascertained and located? We think not. False and impossible parts of descriptions in conveyances may be rejected, where, by doing so, a good description remains. *Tuthill* v. *Katz*, 163 Mich. 618 (128 N. W. 757), and cases there cited.

2. The remaining claim urged by appellant's counsel is that the statement of lien is insufficient because it fails to give the name of the owner of the premises, and does not show that his name is unknown. The specific objection is that the name of M. Finbarg was used, the correct name of the defendant being Meyer Finbarg. In the contract signed by the parties, the name M. Finbarg was used throughout, and it was so signed. As there is no dispute as to the identity of

Digitized by Google

the person or party, we think this claim purely technical, and without merit.

The decree of the circuit court is affirmed, and the complainant will recover his costs in this court against the defendant People's Savings Bank.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PENTLAND v. JACOBSON.

1. SALES—EVIDENCE—WARRANTIES—CONTRACTS—INSPECTION.

Plaintiff sold defendant a quantity of potatoes which were delivered and were later found to be frozen. A tender back was made by the defendant, and plaintiff brought an action for the purchase price; defendant claimed that plaintiff had expressly represented and warranted that the potatoes were in fit condition for use. The testimony showed that at the time of delivery of the first lot the defendant found a number of pounds of frozen potatoes and that the plaintiff said that the rest were all right, that a few had been scattered about and been frozen in his cellar. The court submitted the case to the jury on the theory that if there was no express warranty defendant might rely upon the implied warranty. *Held*, that the testimony as to the representation of the plaintiff, though uncertain, or meagre, was sufficient to support a verdict for the defendant.[1]

2. SAME—IMPLIED WARRANTY—INCONSISTENT WITH EXPRESS WARRANTY.

Under Act No. 100, Pub. Acts 1913, § 15, and subd. 6, an express warranty does not preclude the existence of and re-

[1] On implied warranty of fitness of property bought for special purpose, see notes in 22 L. R. A. 187, 15 L. R. A. (N. S.) 868, 31 L. R. A. (N. S.) 783; 34 L. R. A. (N. S.) 737.

Digitized by Google

liance upon an implied warranty unless the two are inconsistent.

3. SAME—INSTRUCTIONS.

The court did not err in charging the jury that if defendant did not examine the potatoes he was entitled to rely upon the implied warranty of fitness or quality, and upon the statement made by the plaintiff that it would be his duty, after finding defects in the potatoes, to notify plaintiff within a reasonable time, that what was a reasonable time would be for the jury, that if he made no examination but relied upon the warranty that the potatoes were fit for food and were merchantable, afterwards finding that they were not merchantable or fit for food, and notified plaintiff of the fact within a reasonable time, he would not be required to pay for the potatoes.

Error to Luce; Fead, J. Submitted October 18, 1915. (Docket No. 152.) Decided December 21, 1915.

Assumpsit by Moses Pentland against John K. Jacobson for the purchase price of certain potatoes. Judgment for defendant. Plaintiff brings error. Affirmed.

Brown & Brown, for appellant.

Warner & Sullivan, for appellee.

KUHN, J. In this action the plaintiff seeks to recover for potatoes delivered to the defendant in accordance with a verbal contract entered into by the parties; 288¼ bushels of potatoes were actually delivered, the value of which was agreed upon to be $151.20. The defendant contested the action brought for this amount because, it is his claim, there was an express warranty as to the condition of the potatoes, whereas, as a fact, they were frozen at the time of delivery. Upon the discovery of the defective condition of the potatoes they were tendered back by the defendant, and the issue thus formed was submitted to a jury,

Digitized by Google

who returned a verdict of no cause of action, upon which judgment was duly entered.

It is the contention of the plaintiff and appellant that the record shows conclusively that, if the potatoes were frozen, they were frozen after delivery, and that the defendant accepted the first load after inspection, and the other three loads without using the opportunity to inspect. It appears that, when the first load of 113 bushels was delivered under the contract, in the presence of both parties, the defendant culled out 35 pounds of frozen potatoes and as to what occurred at that time he testified as follows:

"I said I was a little afraid of those potatoes, picking out as many as that, just rolling them in. He recommended them to be O. K. He said some potatoes got scattered around and got into the sacks; some that had been frozen in his cellar got into the sacks.

"*Q.* What did he say at that time about the rest of them, whether or not they were all right?

"*A.* Well he didn't say anything about the rest of them, except that he put those in."

On redirect examination he testified:

"*Q.* Now, I understood you to say that when the first load was delivered, and you discovered that there was some frozen potatoes there, that Mr. Pentland told you that was a few that had gotten in that was frozen on top, or on one end?

"*A.* That is what he said.

"*Q.* And that the rest were all right?

"*A.* That is what he said.

"*Q.* Whether or not you relied on his statement to that effect?

"*A.* I relied on his statement and had his word for the potatoes. That is the reason why I didn't cut open the potatoes and examine them carefully to see whether they were frozen or not."

The case was submitted to the jury upon the theory that an express warranty had been established, and also that, if they found no such express warranty had

Digitized by Google

been established, an implied warranty might be relied upon by the defendant. This seems to be sanctioned by the uniform sales law (subdivision 6 of section 15 of Act No. 100, Pub. Acts 1913), providing that:

"An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

Plaintiff contends that the testimony of the defendant with reference to the express warranty is conflicting, and that the question should not have been submitted to the jury to allow them to speculate as to this feature of the case. It is true that the testimony with reference thereto is somewhat uncertain and meager, but we are of the opinion that there was sufficient evidence to submit the question to the jury under instructions which on examination are found to be appropriate and correct. The jury were in a position to notice the manner in which this testimony was given by the witness, and thus determine its credibility. It is also significant in this connection that the plaintiff, in testifying with reference to the contract, said:

"I understood the contract called for good, merchantable potatoes, and did not expect him to pay for anything else, and do not expect him to now. If he didn't get good potatoes, I don't want him to pay for them."

Subdivision 1 of section 15 of said Act No. 100 provides:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

Subdivision 3 provides:

"If the buyer has examined the goods, there is no

Digitized by Google

implied warranty as regards defects which such examination ought to have revealed."

The court charged the jury as follows:

"If, on the other hand, he did not examine the potatoes, then he is entitled to rely upon the implied warranty and upon the statement made by the plaintiff, and it would be his duty, after having found there were defects in the potatoes, if he so found, to notify the plaintiff within a reasonable time. If he did not notify the plaintiff within a reasonable time, and what is a reasonable time is a question for you to determine from the evidence, then he would be held to have to pay for the potatoes. If, upon the other hand, he made no examination, but relied upon the warranty that they were fit for food, that they were merchantable, and afterwards found that they were not proper, were not merchantable, and within a reasonable time notified the plaintiff of that fact, then he would not be required to pay for the potatoes."

After carefully examining the evidence in this record, we are of the opinion that the questions involved were submitted to the jury under proper instructions, and that there is sufficient evidence to justify the verdict reached by the jury.

The judgment is affirmed.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

PATEK *v.* RYSKEWIECZ.

1. JUDGMENT—JUSTICES OF THE PEACE—SECURITY FOR COSTS—ESTOPPEL.

   Where the defendant in a suit in justice's court secured an order of the court to compel the plaintiff to file security for costs, and afterwards removed the judgment by certiorari to the circuit court, claiming that plaintiff had failed to comply with the order, and that security offered in the form of a paper signed by a surety was insufficient and invalid because the surety had not appeared before the justice, he could not recover the costs taxed in the circuit court, after judgment in his favor, from the surety in the undertaking; he was bound by the judgment, and precluded or estopped from basing his action on the writing which his counsel had previously argued was invalid.

2. SAME—CONSIDERATION.

   In the light of the holding of the court, no sufficient consideration for the instrument was shown and it was not a valid common-law obligation.

3. SAME—APPEAL AND ERROR.

   The question whether the assignment to plaintiff of the judgment carried with it said undertaking for costs will not be considered where it was not briefed or raised by the defendant.

Error to Gogebic; Cooper, J. Submitted October 15, 1915. (Docket No. 123.) Decided December 21, 1915.

Assumpsit in justice's court by Julius J. Patek against William Ryskewiecz on an undertaking to secure plaintiff against the costs of an action. Defendant appealed to the circuit court from an adverse judgment. Judgment for defendant. Plaintiff brings error. Affirmed.

Digitized by Google

Julius J. Patek, in pro. per.

Curtis Buck (*Belmont Waples*, of counsel), for appellee.

STONE, J. This case originated in justice's court. It was tried before the court without a jury. The trial court filed a finding of fact and conclusion of law. The finding of fact was based upon a stipulated statement of the facts signed by the attorneys for the respective parties, which was as follows:

"(1) That on the 10th day of October, 1911, one Mary Talkowski, as plaintiff, commenced a suit in assumpsit against one Peter Puksta, as defendant, by ordinary summons, returnable before the aforesaid justice of the peace, at his office in the city of Ironwood, in said county, on the 18th day of October, 1911. That the defendant, Peter Puksta, never appeared generally in said suit before the said justice of the peace, nor pleaded in said cause, but on the return day of said summons the said defendant appeared specially and moved that the plaintiff, Mary Talkowski, be required to give in said cause sufficient security for costs and that in default thereof said suit be dismissed; and the said justice made and entered an order in said suit, that said plaintiff, Mary Talkowski, give security for costs in said cause. That thereupon the said plaintiff in said suit, Mary Talkowski, presented and delivered to the said justice of the peace a certain written instrument in words and figures as follows:

" 'County of Gogebic—ss.:

" 'Mary Talkowski v. Peter Puksta.

" 'Before John O. Gustafson, a Justice of the Peace of Said County. The said plaintiff having been required by the said justice, for good reasons shown, to give security for costs, therefore, I, W. Ryskewiecz, do hereby become security that said Mary Talkowski shall pay the said Peter Puksta any costs which may be adjudged against her, the said Mary Talkowski, in the above-entitled suit.

" 'Dated October 18, 1911.

" 'W. RYSKEWIECZ.'

Digitized by Google

"That said W. Ryskewiecz had not appeared before the said justice on said day nor signed the purported security for costs in the presence of said justice, nor signed an undertaking in writing to that effect, upon the docket of the said justice in said cause. That thereupon the defendant then and there moved the said justice that said cause be dismissed for want of sufficient security for costs, because the same was not an undertaking, in writing, upon the docket of the justice and signed by the surety upon said docket in the presence of said justice, which motion the justice at the request of said Mary Talkowski overruled and at her request proceeded with a trial of said cause, and after hearing plaintiff's proofs, the said justice did on said day render judgment in favor of said Mary Talkowski, as plaintiff, and against the said Peter Puksta, as defendant, for $30 damages and $4.15 costs of said suit.

"(2) That the foregoing facts were alleged in an affidavit for certiorari to remove the said judgment to the circuit court for the county of Gogebic, made on behalf of said defendant, Peter Puksta, and in said affidavit there was and is a further allegation, as follows:

"'Deponent further says that the said pretended judgment is erroneous and void for the reason that the said justice erred in holding that the filing with him by the plaintiff of the piece of paper mentioned, at the time and under the circumstances as stated, was a compliance with said Comp. Laws 1897, § 713.'

"(3) That the said Peter Puksta duly removed the said judgment to the circuit court for said county of Gogebic, by such certiorari, and that after a hearing there had, the said circuit court on the 30th day of March, 1912, reversed the judgment of said justice of the peace, with costs, taxed by consent, in open court, at the sum of $22, including an attorney fee of $15 in favor of the plaintiff herein, the attorney for Peter Puksta in said certiorari proceedings.

"(4) That on said 30th day of March, 1912, the said Peter Puksta duly assigned the said judgment to the plaintiff herein, and plaintiff since then has been and now is the owner thereof.

"(5) That there were no errors in the judgment of the justice alleged in the affidavit for certiorari, upon which the writ was allowed and issued, and none are

Digitized by Google

shown by the return of the justice to said writ, except as above stated.

"(6) That the plaintiff herein, prior to the commencement of this suit, repeatedly demanded of both the said Mary Talkowski and the defendant in this cause, that they pay to the plaintiff the costs so awarded to the said Peter Puksta on reversal of said judgment and that they each refused to pay the same."

The conclusions of law were as follows:

"1. The said judgment rendered by the said justice of the peace, referred to in the foregoing statement of facts, having been reversed on the sole ground that no legal undertaking for security for costs was furnished by the said plaintiff in said judgment, as ordered by the said justice, there was and is no consideration to support the undertaking of the said defendant herein as evidenced by his signature to the paper set out in the first paragraph of the foregoing finding of facts.

"2. Judgment therefore will be rendered in favor of the defendant, with full costs."

Exceptions were duly filed by appellant. A judgment for defendant having been entered, the plaintiff has brought the case here upon writ of error.

By his assignments of error the following propositions are presented:

(1) That the court erred in finding from the stipulated facts that in view of the said judgment rendered by the said justice of the peace referred to in the statement of facts in said stipulation contained, having been reversed on the sole ground that no legal undertaking for security for costs was furnished by the said plaintiff in the said judgment, as ordered by the said justice, there was, and is, no consideration to support the undertaking of the said defendant herein, as evidenced by his signature to the paper set out in the first paragraph of said stipulation, because the suit is founded upon the final judgment rendered in said circuit court reversing that of the justice of the peace, as evidenced by the journal entry of said court, and not upon any reason or reasons why such judgment was reversed and the reason or reasons for the reversal of such judgment are immaterial.

Digitized by Google

(2) That the court erred in finding from the stipulated facts in said cause that the said defendant did not undertake and promise in manner and form as the plaintiff hath in his declaration in said cause complained against him.

By the pleadings in the case, the question of no consideration was raised. The plaintiff here seeks to hold defendant liable on the writing signed by the latter, which writing, by the action and instigation of the plaintiff himself, as attorney for said Puksta, defendant in the original suit, was held, in the certiorari case invalid, and not to be a good and sufficient security for costs. As already appears, in the affidavit for certiorari there was the following statement:

"Deponent further says that the said pretended judgment is erroneous and void for the reason that the said justice erred in holding that the filing with him by the plaintiff of the piece of paper mentioned at the time and under the circumstances as stated, was a compliance with said Comp. Laws 1897, § 713."

It further appears by the stipulated facts:

"That there were no errors in the judgment of the justice alleged in the affidavit for certiorari upon which the writ was allowed and issued, and none are shown by the return of the justice to said writ, except as above stated."

We think the trial judge was therefore warranted in finding that such judgment was reversed, on the sole ground that no legal undertaking for security for costs was furnished, and that said finding was material. The said Puksta and his attorney, the present plaintiff, having asserted that said judgment was void for the reason stated, and having induced the court so to hold, should be now precluded and estopped from claiming that said paper was, and is, a valid security for costs. 16 Cyc. p. 796. We are also of the opinion that there was no valid consideration for such undertaking or promise, and therefore it can-

Digitized by Google

not be said in the light of the result of the first case, that the writing was a valid common-law obligation.

In *Wilson* v. *Davis*, 1 Mich. 156-162, the plaintiff sued defendant on a writing purporting to be a stay of execution, on a judgment, which defendant had signed as surety. The judgment which it was given to stay was held to be void, so that the stay did not accomplish the purpose for which it was given, to wit, to postpone the issuance of a valid execution, because no valid execution could be issued on a void judgment. The court said:

"We think the judgment read in evidence * * * was void, and, therefore, cannot furnish a valid consideration for the promise of the defendant set forth in plaintiff's declaration."

Plaintiff cites in support of his position the cases of *Brion* v. *Kennedy*, 47 Mich. 499 (11 N. W. 288), and *Hascall* v. *Brooks*, 105 Mich. 383 (63 N. W. 413). We do not think those cases support the plaintiff's position.

In the *Brion Case* a security for costs undertaking, substantially like that here involved, was given. It was held to be a good common-law undertaking, because it effected the purpose for which it was given, to wit, to enable the plaintiff to go on with his suit. As it was acquiesced in as effecting such purposes, this court held it to be supported by a sufficient consideration. No question was raised as to the validity of the judgment. In the instant case, the judgment, because of the invalidity of the instrument sued upon, was held to be void and of no effect. That ruling became the law of the case, as it was final, and not appealed from.

In the *Hascall Case*, an insufficient appeal bond was given. In the circuit court the appeal was dismissed because the opportunity given by the court to replace the bond with a valid one, and so maintain the case in that court, was not embraced. It was held that the

Digitized by Google

bond given, though not sufficient in the amount of the penalty, conferred jurisdiction upon the court to act in the premises. In other words, the defective bond accomplished the purpose of getting the case into the circuit court, and giving that court jurisdiction. There was therefore a valid consideration to support the obligation of the surety on the bond. Not so in the instant case, according to the judgment on certiorari.

Another question suggests itself, and that is whether the assignment of the judgment to the plaintiff carried with it the title to the undertaking. See *Forrest* v. *O'Donnell*, 42 Mich. 556 (4 N. W. 259). As the question is not raised, or briefed, we express no opinion upon it.

We find no reversible error in the record, and the judgment of the circuit court is affirmed.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

DALLAVO *v.* DALLAVO.

1. CANCELLATION OF INSTRUMENTS—DURESS—HUSBAND AND WIFE—DIVORCE.

   In a suit to cancel certain conveyances and deeds between complainant and his wife in settlement of their marital affairs, and to induce defendant to consent to let a decree of divorce stand between the parties which she claimed had been procured by his fraudulent representations concerning her place of residence, evidence of a conflicting nature considered, and *held*, to warrant the conclusion of the trial court that the complainant failed to establish his claim of duress under threats of prosecution.

Digitized by Google

2. SAME.

The fact that complainant weighed in his mind what consequences might result from his failure to enter into a settlement, unless actual threats of prosecution were made by the wife, did not establish that he was so bereft of the quality of mind and power of will essential to entering into contracts as to be incapacitated to exercise freedom of will power.

3. SAME—EQUITY—CLEAN HANDS.

That complainant was not innocent of wrong doing was not a ground for denying to him equitable relief under the maxim that he who comes into a court of equity must come with clean hands.

4. SAME—MARRIAGE SETTLEMENT—CONTRACTS—CONSIDERATION.

The fact that the wife agreed in the contract to care for and support the minor children of complainant was sufficient consideration to support the agreement.

5. SAME—HUSBAND AND WIFE—DOWER.

But *held*, that the dower interest of complainant's second wife should be preserved and the court of equity should retain jurisdiction for that purpose and an order dismissing the bill of complaint is reversed.

Appeal from Kent; McDonald, J. Submitted October 22, 1915. (Docket No. 153.) Decided December 21, 1915.

Bill by John Dallavo and wife against Henrietta Dallavo and another to set aside a contract and certain instruments of conveyance. From a decree dismissing the bill, complainants appeal. Modified and affirmed.

Smedley & Linsey, for complainants.

L. C. Palmer and *Clapperton, Owen & Hatten*, for defendants.

KUHN, J. The bill of complaint in this cause alleges duress, fraud, and want of consideration as grounds for setting aside certain instruments, to wit, a deed executed by the complainants on the 17th of August,

Digitized by Google

1912, to the defendant Henrietta Dallavo, conveying the fee in certain property hereinafter called the "Finch property;" a certain contract entered into between John Dallavo and Henrietta Dallavo on the same day concerning the same property; a certain life lease from Henrietta Dallavo to John Dallavo covering a part of said property; a certain mortgage executed at the same time covering an 80-acre farm located in Home township, Montcalm county; and also two promissory notes amounting to $225, executed by John Dallavo and payable to the defendant Palmer.

The decree of the court dismissed the bill of complaint, but held that, as to the complainant Marie Dallavo, her deed to the land in question was without legal consideration, and the conveyance to Henrietta Dallavo was confirmed, subject, however, to the dower rights of said Marie Dallavo therein, and the life lease to John Dallavo. From this decree the complainants have appealed.

The complainant John Dallavo, who was an Austrian by birth, was married in 1880 to the defendant Henrietta Dallavo in Germany. While serving a prison sentence in Germany for subornation of perjury he escaped, and found his way to this country about 1886, and settled near Howard City in this State, where he was joined later by his wife and three children. He engaged in the lumber business, and carried on a general business in connection therewith, and through the joint efforts of himself and his wife, who in addition to her family cares and duties, boarded the men employed, took principal charge of the business affairs, kept the books of account, did the buying and selling, etc., they accumulated about $50,000 in property, and reared a family of ten children. After he became prosperous, however, he became faithless to his wife and consorted with other women, which conduct on his

Digitized by Google

part was endured by the wife for years because of her love for the family and her desire to avoid the disgrace of a divorce.

In 1907 they sold their lumber business in Greenville to the older two sons for $8,000, which was paid in the form of notes, which were equally divided between the father and mother. In 1908 there was a mutual division of the title to the real estate accumulated through their joint efforts, because he was at that time contemplating the purchase of a large track of timber in the South and desired to mortgage his property for the purpose of raising money for that purpose, and his wife did not wish to join in the scheme. The property conveyed to her at that time was approximately of the value of $7,250, and the properties left in the complainant were variously estimated to be worth from $20,000 to $36,000. His conduct with relation to other women continued, however, and finally culminated in February, 1911, in her retaining the defendant Palmer to file a bill for divorce, which was later dismissed by her. During the fall and winter of 1911 and 1912 he lived with another woman, who afterward brought suit against him for breach of promise of marriage.

In the summer of 1911 one of his daughters, becoming ill, was advised by her physician to go to California, whither she was accompanied by her mother, Mr. Dallavo providing part of the money necessary for the expenses of the trip. She left Grand Rapids in August, 1911, and returned October 14th of the same year. The complainant came to the house where she was staying and saw the mother and children, and visited with them. In September, while she was in California, he went to Grand Haven, Mich., and through an attorney there filed a bill for divorce, alleging that he was a resident of Ottawa county, and that his wife

Digitized by Google

was then living in California. In November, 1911, for the purpose of obtaining substituted service in his divorce proceedings he went to Grand Haven and made the affidavit that his wife was not a resident of Michigan but a resident of California, and in June, 1912, he again went to Grand Haven, and obtained a decree of divorce on his own testimony, without any knowledge of the divorce proceedings being imparted to any of his family until some time after the decree. He met his wife a few days after the decree, but said nothing to her, and she thereupon went to Pittsburg to visit a sister, and on July 12, 1912, he married the complainant Marie Brooks Dallavo, who was at that time between 17 and 18 years of age.

The first one of the family to talk with Dallavo about his divorce was his son Joe, who lived at Greenville, and who saw a notice of the marriage in the paper, and informed his mother about it. On her return to Grand Rapids in August, 1912, to visit her daughter, she called at the office of the prosecuting attorney of Kent county, to inquire as to the legality of the divorce proceedings, which were prosecuted without notice to her. The assistant prosecutor who advised with her said he would write to Dallavo and ask him to come in and explain the proceedings, which he did. The next morning, about 5 o'clock, Dallavo called his wife by telephone, and requested an interview with her apart from the children, which she granted. When she met him he begged her not to make complaint against him, and not to have him sent to jail. After some talk it was agreed that if no trouble was made for him he would give her a deed to a farm at Wyman and pay her $30 a month for the support of the three minor children as long as they remained in school. They went to the office of a notary public, where this agreement was carried out, a deed being made to their daughter Louise, she in turn deeding to her mother.

Digitized by Google

The complainant thereupon requested her to give him a release in writing, which the defendant said she could not do until she had seen an attorney.

The same day she took a train and went to Stanton, Mich., where she interviewed the defendant L. C. Palmer, her attorney, who returned that evening with her to the city of Grand Rapids. Complainant met them at the depot, and he was there informed that the matter was entirely in the hands of Mr. Palmer for settlement. The next morning Mr. Palmer came to the office of Grove & Davis, who were then representing the complainant in some litigation in the courts of that county, and inquired whether or not they had represented the complainant in the divorce proceedings in Grand Haven. Mr. Palmer told Judge Grove certain things that he believed to be true concerning the divorce proceedings. Thereupon Mr. Davis left a telephone call for the complainant to call at their office. Mr. Palmer went to Grand Haven to examine the divorce proceedings, and upon his return called on Grove & Davis, and informed them of the nature of the proceedings in Grand Haven, and of his intention to file a petition to set aside the divorce. Mr. Dallavo, with his son Joe, called at the office of Grove & Davis, and the whole matter was talked over between Messrs. Palmer, Grove, Davis, Dallavo, and his son. Mr. Davis advised Mr. Dallavo and his son Joe of the serious character of the claims that Mr. Palmer had made with reference to the divorce proceedings, and that if they were true they might constitute the basis of charges of perjury and possibly bigamy. The son Joe thereupon stated that the father desired to avoid publicity and have the affair settled up, and suggested that they have a talk with the mother, who was then at the daughter's home. The son Joe and Mr. Palmer thereupon went to the place where defendant was staying to talk over the settlement. That evening the

Digitized by Google

son Joe again met the complainant and told him that the mother would accept nothing less than the Finch property.

The next day Mr. Palmer continued negotiations with Grove & Davis and Dallavo along the lines suggested by the son Joe, and it was insisted that Mrs. Dallavo should give him a life lease of the property, which at first Mr. Palmer declined to do, but after another interview with Mrs. Dallavo, was agreed upon. The signature of the new wife being necessary to the conveyance, it was arranged that Mr. Dallavo should go to Sand Lake, where his wife was visiting her people, and bring her and her father, who was a justice of the peace, to a conference the next day. They did come the next day, and Judge Grove and Mr. Davis explained to the wife and her father the situation, and what was proposed by way of an adjustment. Upon being told that if the arrangement was carried out the decree of divorce would be enrolled so that her rights as his wife would be established, she and her father advised the settlement and lease, which were duly executed and delivered a few days later. It was also agreed on the part of Dallavo that the property should be relieved from incumbrance. After the settlement had been executed, and before the papers were recorded, Dallavo obtained a loan of $4,000 from a building and loan association, which had no knowledge of the conveyances, and secured it by a mortgage on the Finch property executed by himself and his wife Marie.

It is the claim of the complainant—and he so testified—that during these proceedings he was nervous, excited, and very much worried and scared, and that it was under threats of prosecution for perjury and bigamy that he agreed to deed the Finch property to the defendant; and that he did so only because of these threats that were made against him, and because he was fearful of being arrested.

Digitized by Google

It is denied on the part of both Mr. Davis and the defendant Palmer that any threats were made, and that any pressure was made upon him to make a settlement. The son Joe also testified that not only was no threat or expression of intention to prosecute made, but his mother had stated to him that she would not take any action against his father in court, even if he should refuse to make the provision for the family which they had demanded; but he did not claim that he told his father. He said that his father cried and bemoaned the fact that he was going to lose so much property, but said that he had seen him cry hundreds of times, and Mrs. Dallavo says that these penitential tears had often flowed freely when he was called to account for wrongdoing, until he had been forgiven. The daughter characterised them as "crocodile tears."

The learned trial judge who heard the testimony and who saw the witnesses on the witness stand, in determining the question of fact, and speaking of the testimony of John Dallavo, said:

"In regard to that I am convinced that every disputed question of fact must be determined without reference to his testimony. His deceitful conduct toward his former wife, Henrietta Dallavo, his apparent readiness to perjure himself in the divorce suit, and his reckless and unfounded sworn allegations in this bill forbid my placing the slightest credence in his testimony."

With this conclusion we are in accord. We do not believe that his testimony on disputed questions of fact is entitled to any credence. It is very apparent from a reading of this record that through all the negotiations with reference to the transfer of property, the complainant had the benefit of the advice of competent and experienced counsel. Judge Grove, a lawyer of unquestioned standing at the bar, testified:

"From the beginning to the end, Mr. Davis talked over the matter with me from time to time, and he in

Digitized by Google

my judgment was unusually cautious and careful trying to protect Mr. Dallavo just as far as he possibly could. I never knew a case where an attorney seemed to be more earnest in his efforts to protect a client than Mr. Davis showed all the way through."

It appears that even his attorneys did not advise him to make this settlement, advising him only to exercise his own judgment, based upon a knowledge of the facts. He undoubtedly made the settlement, knowing the consequences of what might follow if he did not make it. But we think that it clearly appears that he made it only after deliberation and after having had the advice of his son Joe, his new wife, and her father.

The legal question as to what constitutes duress has quite recently had the consideration of this court, in the case of *Clement* v. *Mercantile Co.*, 172 Mich. 243 (137 N. W. 657), and what was said there by Mr. Justice STEERE is clearly applicable here:

"The law does not recognize duress by mere suggestion, advice, or persuasion, especially where the parties are at arm's length, and represent opposing interests. 9 Cyc. p. 443. * * * The only duress claimed is *per minas*—by threats and intimidation. To constitute this, it must appear that the party coerced was so intimidated and moved by the threats made as to cease to be a free moral agent, and became so bereft of those qualities of the mind essential to entering into a contract as to be incapacitated to exercise his free will power in that connection. * * * As a rule, duress will not prevail to invalidate a contract entered into with full knowledge of all the facts, with ample time and opportunity for investigation, consideration, consultation, and reflection. Clement knew the facts in this case, was given ample opportunity, and invited to investigate, and was free to consult with whomsoever he saw fit."

Likewise in this case, it clearly appears that Dallavo was informed with reference to all the facts concerning the situation which confronted him. He knew

Digitized by Google

the facts better than any other person. He was given ample opportunity to investigate, and was invited to, and did consult with whomsoever he saw fit. Undoubtedly he weighed in his mind the consequences that might result from his failure to make the agreement that he did, but we are not convinced that simply because he bemoaned the condition that he found himself in, he was "so bereft of those qualities of the mind essential to entering into a contract as to be incapacitated to exercise his free will power in that connection." We think that he did exercise his free will power, and that therefore the testimony does not sustain the claim of duress as to himself.

The fact that he comes into a court of equity with unclean hands should not, under the authority of *Briggs* v. *Withey*, 24 Mich. 136, necessarily deny him the right to relief, but it does not relieve him from the necessity of convincing the court of the fact that the arrangement that he made was one procured by fraud or by duress *per minas*.

We also agree with the conclusion of the trial judge that the deed signed by the present wife was without legal consideration so far as she was concerned, and that it was proper to preserve to her her dower rights. *Clement* v. *Mercantile Co., supra.*

The contract provided the following as consideration moving to Dallavo:

"In consideration of the faithful performance of the agreements and undertakings to be performed by first party, as hereinbefore recited, said second party does hereby undertake to support the minor children of said parties hereto, the issue of the marriage heretofore existing between said parties, and said second party also hereby acknowledge receipt and payment in full of all dues, demands, and claims of every name and nature existing at this date."

At the time of the settlement there were three minor children, and we think that the agreement in the con-

Digitized by Google

tract on her part to support those children was a sufficient consideration under the circumstances of this case to sustain the settlement as made.

The decree also properly provided that the complainants should pay the mortgage placed by them on the Finch property, and by consent of the parties the deed to the daughter Louise and the one by her to her mother of the farm at Wyman was set aside.

The trial judge made a proper disposition of the case before him, and we therefore affirm his decree, except as to dismissing the bill, with costs to the defendants.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

MILLER *v.* RIVERSIDE STORAGE & CARTAGE CO.

1. MASTER AND SERVANT—DEATH—WORKMEN'S COMPENSATION—INDUSTRIAL ACCIDENT BOARD—DEPENDENTS.

   It is a question of fact, from testimony that is in conflict or sustains different inferences, whether a claimant under the workmen's compensation act, not among those who are conclusively presumed to be dependent, was actually in the dependent class. (Act No. 10, Extra Session 1912.)

2. SAME—EVIDENCE—KIN.

   Testimony to prove that a deceased brother contributed to claimant's support, though she partially sustained herself by her labors as a stenographer, reviewed on certiorari to the Industrial Accident Board, and *held*, to sustain its award of compensation.

Digitized by Google

3. SAME.

The test of dependency is not whether the members of the family could support life without the contributions of decedent, but whether they depended on him for part of their income or means of living.

Certiorari to the Industrial Accident Board. Submitted October 19, 1915. (Docket No. 155.) Decided December 21, 1915.

Blanche Miller presented her claim against the Riverside Storage & Cartage Company and another for compensation for the death of her brother. From an award granted by the accident board, respondent brings certiorari. Affirmed.

Clark, Lockwood, Bryant & Klein, for claimant.

Florian, Moore & Wilson, for defendants.

OSTRANDER, J. Thomas Miller was employed by the Riverside Storage & Cartage Company at a wage of $15.50 per week. He died from an injury found to have been sustained by him in the course of and growing out of his employment; the injury being received September 2, 1914. Claimant is his sister. Whether she was dependent upon him, within the meaning of the statute, is the question presented; it being claimed there was no evidence of dependency. The award of the committee of arbitration was approved by the Industrial Accident Board. The award was:

"That the said applicant, Blanche Miller, is entitled to receive and recover from said respondents, Riverside Storage & Cartage Company and London & Lancashire Guarantee & Accident Company the sum of three ($3) dollars per week for a period of three hundred (300) weeks, from the 2d day of September, 1914, and that said applicant is entitled to receive and recover from said respondents on this date thirty-three dollars, being the amount of such compensation that has already become due under the provisions of

Digitized by Google

law, the remainder of said award to be paid to said Blanche Miller, applicant, by said respondents in weekly payments, commencing one week from the date of the award."

Whether one is or is not dependent upon another for support is, of course, a fact. By the terms of the act persons standing in certain relations to a deceased employee are conclusively presumed to be wholly dependent upon him for support. Claimant is not one of them, nor were there any such dependents of the deceased employee. She is, however, a person who may be a dependent. It is provided that, if the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the weekly compensation to be paid (by the employer) shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependent bears to the annual earnings of the deceased at the time of his injury. Questions as to who constitute dependents and the extent of their dependency are to be determined as of the date of the accident to the employee, and their right to any death benefit becomes fixed as of such time, irrespective of any subsequent change of conditions.

Testimony for the claimant, who is 22 years old, tended to prove that from the time he was 16 or 17 years old her deceased brother, who was 7 years her senior, had contributed to her support. Claimant went to Detroit when she was 18 years of age, and, with her brother's aid, educated herself to be a stenographer. She was employed by one concern some 2½ years, first at $8 a week, then at $10, and for some time before her brother was injured at $12 a week. She lost some time, but was paid her full salary. She quit work in August, 1914, going on a visit to her old home in Colorado, and was in Colorado when her brother was in-

Digitized by Google

jured. She testifies that her brother regularly gave her $6 a week until she left Detroit. He then gave her $75 for her journey. From February 8, 1913, to August 17, 1914, claimant had on deposit in a savings bank $70. She took music lessons "off and on" while in Detroit, and, not being strong physically, paid out considerable money, the last in May, 1914, for medical attention. At the hearing in December, 1914, she was employed at $10 a week. She went to Colorado, she says, for rest, being nervous and not doing her work well. The deceased brother received as much as $18 a week at one time at one place where he worked in Detroit. He received occasionally tips, or extras, she says, while employed by the respondent. Claimant paid for room and breakfast and dinner $5 a week; for lunches 25 cents each; for car fare 75 cents a week. She purchased clothing during the period from September, 1913, to September, 1914, $112.25. She made a visit to Pennsylvania during the time she lived in Detroit. She did no work while upon her last visit to Colorado, and paid nothing for board or room. She received nothing during that period from her brother. The arrangement they had made was that he was to go to Colorado and return to Detroit with her. Upon cross-examination she computed her expenses for the year ending in September, 1914, including room, food, clothing, and street car fare, at $489.25. And counsel say that, being in a position to earn, and earning, when at work, a sum equal to $520 or more annually, she was not, upon her own computation and statement, dependent upon any one; she was independent.

It is probable that in every case where a brother or sister of a deceased employee claims relief under the statute the evidence of dependency will necessarily be evidence of contributions made by the deceased, because in such cases the support furnished by either to the other, or the service rendered by either to the

Digitized by Google

other, will be voluntary. But voluntary contributions of money, support, or service by a brother to a sister, or by a sister to a brother, are not necessarily evidence of the dependency of either, or of the extent of dependency, within the purview of the statute. The legislature has not defined "dependent;" it is probable that no standard for the determination of dependency, in fact, can be formulated. In a case in which a father sought compensation on account of the death of a son who had contributed to his father a certain average sum weekly, it was said that the question is whether the father

"made a loss by the death of his son, in consequence of there no longer being a source of assistance to him from his son's earnings in the work at which he was killed, and on which source, from his own inability to earn wages himself, he was wholly or partially dependent." *Arrol & Co., Ltd.*, v. *Kelly*, 7 F. 906, 42 Sc. L. 695.

In *Simmons* v. *White Bros.*, 80 L. T. 344, 1 W. C. C. 89, and in *Main Colliery Co., Ltd.*, v. *Davies*, 2 W. C. C. 108, one or more of the judges were of opinion that:

" 'Dependent' probably means dependent for the ordinary necessaries of life for a person of that class and position in life."

So in *Howells* v. *Vivian & Sons*, 85 L. T. 529, 4 W. C. C. 106, it was said:

"The test of dependency is not whether the family could support life without the contributions of the deceased, but whether they depended upon them as part of that income or means of living."

These expressions, called out by the facts of particular cases, do not supply a rule. As cases arise, in some of which the facts are held not to prove, and in others to be consistent with, dependency, debatable ground will be narrowed. Unless a standard of independence for unmarried women who work for and live upon wages can be set up which classes as independent all

Digitized by Google

who earn $10, or even $12, a week, or more, it cannot be said there was no testimony tending to prove the dependency of claimant. It is manifest there are many women who regard themselves as independent, who live wholly upon their wages, who receive a smaller weekly wage. According to the report of the commissioner of labor published in 1915, there were employed in Detroit 1,974 female stenographers who received wages; the average daily wage being $2.22. In 2 cities only out of 60 in the State reported is there paid a higher average daily wage. Assuming six days a week's work, the average wage per week was $13.32. This is more than claimant ever received, and more than $3 per week more than she was earning when her deposition in this case was taken. That she can maintain herself upon the wages she is getting is probably true, at least with good, or fair, health. She says she has not good health, and an agent of her former employer testified that she is nervous and excitable.

Upon all of the testimony, the arbitration committee and the Industrial Accident Board held that she was partly dependent upon her deceased brother. I do not think it clear that the finding is wholly unsupported by testimony.

It follows that it should be and is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. v. STERLING.

1. BOUNDARIES—FENCES—AGREEMENT OR ACQUIESCENCE.
   A fence which plaintiff's lessor, a railroad corporation, erected in 1871, as it supposed, upon the line of its property, and which the adjoining proprietor assumed to be on the line, until about 1913, did not become the boundary line by acquiescence and agreement; not being located correctly.

2. SAME—ADVERSE POSSESSION—OCCUPATION.
   In order to bind the interested proprietors it is necessary that the parties make an honest attempt to fix the true boundary and agree upon a line orally or otherwise according to which they afterwards occupy the premises.

3. SAME—TACKING ON POSSESSIONS.
   Without a privity between the successive owners in possession, the several possessions cannot be tacked together so as to create continuity. Hence, a proprietor who entered on his property under a deed of conveyance which excluded by description the land in dispute, could not maintain his claim thereto by adverse holding based upon his own possession and that of his predecessors in title.

Error to Hillsdale; Chester, J. Submitted October 21, 1915. (Docket No. 74.) Decided December 21, 1915.

Ejectment by the Lake Shore & Michigan Southern Railway Company against John S. Sterling. Judgment for plaintiff. Defendant brings error. Affirmed.

C. A. Shepard, B. E. Sheldon, and *J. C. Riggs,* for appellant.

Herbert R. Clark, for appellee.

The suit was begun October 27, 1914. From appellant's brief the following statement of facts is taken:

Digitized by Google

"On November 16, 1869, Mary E. Beagle conveyed to the Detroit, Hillsdale & Indiana Railroad Company, by deed recorded in Liber 71 of Deeds of Hillsdale County on page 28, its right of way through the northwest fractional quarter of section nineteen (19), Somerset township, in said county, described as follows:

"'One hundred feet in width, being fifty feet on each side of the line which may be hereinafter established by said company for the route of their railroad over and across the northwest fractional quarter of section number nineteen (19), town five (5) south, of range one (1) west.'

"Soon thereafter the line for such route was established, and in due course of time, immediately following, its said railroad was by said company constructed and put in operation along said route, and its right of way inclosed as required by law. Thereafter, on February 10, 1871, the said Mary E. Beagle conveyed to said company, for station grounds in the village of Jerome, 4.47 acres adjoining said right of way on its northerly side and bounded as follows:

"Commencing at the point where such northerly boundary line of said right of way intersects the north and south quarter line of said section, and running thence south 51 degrees west 1,300 feet along said northerly boundary line; thence north 187½ feet; thence north 51 degrees east 1,300 feet; thence south 187½ feet to the place of beginning.

"Afterwards, on March 11, 1873, the said Mary E. Beagle conveyed to A. P. Cook all of said northwest fractional quarter section lying to the north of and adjoining said station grounds. Afterwards, and on September 5, 1881, the said railroad company, under the name of the 'Detroit, Hillsdale & Southwestern Railroad Company,' leased in perpetuity its said railroad to the Lake Shore & Michigan Southern Railway Company.

"The railroad was completed and put in operation early in the year 1871, and its right of way and added station grounds fenced through said quarter section as required by the statute then in force. This original fence on the northerly side of said station grounds stood for more than 20 years until 1893, when the

Digitized by Google

plaintiff made a survey thereof and of the northerly line thereof, and afterwards in the same year built a new fence along the said northerly side of said added grounds which stood until 1913. Neither the fence of 1871 nor that of 1893 enclosed the land in controversy within the railroad grounds.

"In the spring of 1913 plaintiff replaced the 1893 fence with a new fence placed between two and three feet further to the north and then for the first time took into the railroad grounds the parcel in dispute. This parcel, from the date of his deed in 1873, had been used, claimed, and occupied by A. P. Cook as his own to the time of his conveyance to the A. P. Cook Company in 1886, and from that time claimed, used, and occupied by the said company to 1901, when said company conveyed to George S. Cook, and was claimed, used, and occupied by George S. Cook to 1905, when he delivered possession to defendant under land contract, and by defendant since that time. These several possessions have been open, notorious, continuous, and hostile to the ownership or right of possession of anybody else.

"Neither the plaintiff nor its lessor ever had possession of the disputed parcel until 1913, when plaintiff moved its north boundary line fence to the north as before stated. From 1873 to 1913 the defendant and his grantors had openly, notoriously, and continuously occupied, possessed, cultivated, and improved up to this fence, which had been maintained on substantially the same line for 40 years. The disputed parcel was at the time of the removal of the line (1913) a small corner of the cement foundation of defendant's coalhouse and contains 7.48 square feet, of value, as ground simply, not exceeding four cents.

It is amended by appellee as follows:

"Plaintiff and defendant derived title to their respective lands from a common source, Mary E. Beagle. The deed from her to the railroad company of the right of way and the land north thereof, including the land in dispute, was made first and was recorded. Afterwards she deeded to defendant's predecessors the land now owned by him. In each of the deeds from Mary E. Beagle on down until defendant finally acquired

Digitized by Google

title, the southern boundary was given as the northern boundary of the railroad land. The land in controversy was not included in the description in any of the deeds from the time Mary E. Beagle owned it to the time it was deeded to defendant; neither do any of the deeds attempt to transfer possession of it. None of the parties owning or occupying the land in dispute did so for a period of 15 years. There is no evidence that there was anything said verbally about transferring possession of the land in dispute when any of the transfers were made. There is no evidence that any agreement or understanding was entered into between the plaintiff and defendant, or between plaintiff's predecessor and defendant's predecessors, that the fence where built should be considered as the boundary line."

We have before us neither the plat of the village of Jerome nor the blueprint used at the trial. Testimony was produced which tended to prove the facts above stated. The court, after stating the contentions of the parties, omitting the claim of defendant of title by adverse possession, advised the jury:

"Then you are instructed that if you find from the evidence that the fence was built soon after 1871, and rebuilt about 1893, was built and maintained as the true northerly boundary of the railroad grounds, and acquiesced in by the plaintiff and defendant and his grantors as the true northerly boundary line of the railroad grounds until 1913, then your verdict should be for the defendant.

"The contrary of this is true. If you do not find that the fence was built in 1871, or about 1871, and rebuilt about 1893, and that the same has not been maintained as the true northerly boundary line of the railroad grounds, or that the same has not been acquiesced in by the plaintiff and the defendant and his grantors as the true northerly boundary line, then your verdict would be for the plaintiff.

"You are instructed that the amount of land involved in this controversy, or its value, has nothing to do with the merits of the case. And if the plaintiff is entitled to recover you should bring in a verdict in its favor

Digitized by Google

the same as though a large amount of land and of large value was involved.

"The burden of proof is on the plaintiff to show title. And, gentlemen, if you believe that the surveys made by the two civil engineers who have taken the stand here is a true survey, then you should find that the plaintiff has record title to the land in question.

"The burden of proof is on the defendant to show that the old fence, and the fence that has been maintained until 1913, was acquiesced in by both the plaintiff and defendant as the true boundary line."

Defendant preferred requests to charge, which were not given, among them the following:

"The court instructs the jury that to constitute adverse possession, as explained in these instructions, for the period of 15 years, it is not necessary that the same person should have himself been in possession of the premises for the whole of that period. It is sufficient if the evidence shows that he and those under whom he holds, either as heir or purchaser, have held such possession for the full period of 15 years.

"You are further instructed that the title to real estate may be acquired by prescription, which is as valid and binding as one acquired by deeds; so if you find that the defendant and his grantors had been in possession and occupancy, exercising acts of ownership and claiming title to this land in question, for a period of 15 years prior to the time of the bringing of this suit, defendant's title to this land would thereby become absolute and perfect by prescription, and your verdict should be for the defendant.

"If the plaintiff or its lessor built a fence as and for its north boundary of its grounds, and maintained it for 20 years or more, and replaced it with a new one on substantially the same line, and the defendant and his grantors acquiesced therein, and in good faith and with a claim of right occupied, cultivated, and built upon their adjoining lands up to the line of said fence for the full period of the statute of limitations, and such occupancy was continuous, exclusive, open, and notorious, then the plaintiff would be estopped to deny that such fence was its north boundary, and if you should so find from the evidence the facts to be as

Digitized by Google

above premised your verdict should be for the defendant.

"A jury may infer a practical location of a disputed boundary line by agreement by long acquiescence less than the period necessary to constitute adverse possession, from acts and declarations of the parties."

The jury returned a verdict for plaintiff, upon which judgment was entered. A new trial was refused. There are several assignments of error, which need not be recited or expressly referred to. Plaintiff's title to the land, record title, being established, it must prevail, unless defendant has acquired title by adverse possession, or, what is equivalent to title, by a settlement of the boundary line.

OSTRANDER, J. (*after stating the facts*). 1. It may be inferred that both plaintiff's lessor and plaintiff meant to build the fences erected by them on the boundary line of the property. It may be inferred that defendant and his grantors assumed that the fence was upon the line. Beyond this the testimony does not permit us to go in the way of establishing a boundary line by agreement and acquiescence. The controlling rule is stated in *Smith* v. *Hamilton*, 20 Mich. 433 (4 Am. Rep. 398), is a rule of property, and has been consistently adhered to. *Olin* v. *Henderson*, 120 Mich. 149 (79 N. W. 178); *Sheldon* v. *Railroad Co.*, 161 Mich. 503 (126 N. W. 1056); *Parsons* v. *Bills*, 163 Mich. 415 (128 N. W. 721). Upon this subject there was no question for the jury to determine.

2. It is apparent that if defendant, who occupied the land for 8 years or more before disseised by the plaintiff, may add to his period of occupancy the periods when the land was occupied by others, he has acquired title by adverse possession. With those others, of whose periods of occupancy he claims the benefit

Digitized by Google

and advantage, he is in privity by deed of the adjoining land. But his own, or their, paper evidences of title do not convey the land in dispute, but exclude it. It is the rule that one having a deed of land enters under his deed. In the dissenting opinion of Mr. Justice MOORE, in *Sheldon* v. *Railroad Co.*, 161 Mich. 503, 517 (126 N. W. 1056), a stronger (and somewhat similar) case is stated in favor of tacking successive possessions of successive occupants of land than can be supported by the testimony in the case at bar. But this court held, and the ruling is controlling here, that there was no unity of possession under the original hostile entry; that without privity between successive occupants the several possessions cannot be tacked together, so as to make continuity of possession.

3. The disposition of the principal questions involved hereinbefore indicated, renders discussion of other questions debated in the briefs unnecessary, and requires a judgment affirming the judgment of the court below.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

BALDWIN *v.* BOARD OF SUPERVISORS OF ALGER COUNTY.

1. MANDAMUS—INTOXICATING LIQUORS—PARTIES—PUBLIC INTEREST—ELECTIONS—RECOUNT OF BALLOTS.

Relators, who were qualified electors of the city in which a recount of ballots cast in a local option election was asked and made, were proper parties, in the discretion of the circuit court, to institute mandamus proceedings to test the

Digitized by Google

propriety of recounting certain precincts, for the recognized rule against the intervention of private parties to redress grievances that affect the public is not absolute, but discretionary.

2. SAME—PROSECUTING ATTORNEY.

And where the election was close and the interest of the electors general, and intense, the trial court did not err in determining that the prosecuting attorney was not the only proper party to file a petition for mandamus and that private individuals might ask the intervention of the court.

3. SAME—PROPER REMEDY—RECOUNT.

Mandamus is the appropriate remedy of such relators to test the right of the board of supervisors to recount the ballots in boxes that had not been lawfully sealed; the duty of the board in canvassing returns and recounting the votes is ministerial and may be enforced in a proper case by the court.

4. SAME—STATUTORY REQUIREMENTS.

The apparent purpose of Act No. 327, Pub. Acts 1913, providing for a recount of votes by boards of supervisors, was to change the previously existing law, as to the power of the board to ascertain whether or not the statutory requirements relative to sealing and preserving the ballots had been observed.

5. SAME—JUDGMENT—CONCLUSIVENESS.

Where the board in recounting the ballots in certain districts took testimony to ascertain what was the condition of the ballots and whether they had been tampered with, and where no claim was made to the board that they had been tampered with, but objection was raised only to the condition of the ballot boxes, or manner of sealing them, the determination to open the boxes was a decision of fact, and, whether right or wrong, was conclusive upon the court.

Certiorari to Alger; Fead, J. Submitted October 19, 1915. (Calendar No. 26,945.) Decided December 21, 1915.

Mandamus by Frederick J. Baldwin and others against the board of supervisors of Alger county to

Digitized by Google

compel respondents to amend their return of a recount of the ballots cast at a local option election. From an order denying the writ, relators bring certiorari. Affirmed.

H. B. Freeman (*William P. Belden*, of counsel), for relators.

F. T. McDonald (*William F. McKnight*, of counsel), for respondent.

OSTRANDER, J. Although issues of fact were framed and tried by the court, none of the testimony is returned or made part of the record. The plaintiffs in certiorari (relators) adopt the finding made by the circuit judge as "a true, correct, and adequate statement of the facts relative to this controversy."

A local option election was held in Alger county in April, 1915. The board of supervisors canvassed the returns, and from them found that 768 votes had been cast in favor of and 766 votes against prohibition. Petitions for a recount of the votes in several precincts were filed. One asked for a recount of votes in Au Train, Onota, Rock River, Limestone, Mathias, and precinct No. 1 of Munising; another for a recount of votes cast in precinct No. 2 of Munising; another for a recount of votes cast in the city of Munising; another for a recount of votes cast in precinct No. 3 of Munising. Acting as a committee of the whole, the board recounted the votes in these several precincts, and submitted to the board a majority and minority report. A change of 5 votes in favor of nonprohibition was the result of the recount, and the board declared that 764 had been cast in favor of and 766 votes against prohibition.

"It is conceded by the parties that the boxes in Rock River township and the city of Munising were properly sealed, and the recount returns therefrom are

Digitized by Google

correct. This controversy, therefore, rests upon the recount of Limestone township and precincts No. 2 and 3 of Munising township, and the whole question involved is as to whether the committee was justified in recounting the votes therein in view of the condition of the ballot boxes; there being no testimony here to indicate that the recount committee did not properly count the ballots found in said boxes."

The circuit judge found and stated in detail the condition of the ballot boxes in the precincts in question. Omitting the details, the substance of the finding is that, while the boxes were not sealed in the manner required by the statute, there was no evidence that the ballots found in the boxes and recounted, were not the original ballots cast at the election.

Relators are qualified electors of the city of Munising, signed the original local option petition, and were actively interested in favor of prohibition in the county of Alger. Before asking the circuit court to compel respondents (defendants in certiorari) to reassemble and declare a correct result of the election, they applied to the attorney general to begin the proceeding or to permit the use of his name in that behalf. The request was refused. The prosecuting attorney of the county attended the sessions of the board of supervisors and the recount committee—

"advised them three or more times upon matters connected with the recount, and at the conclusion prepared the resolutions finally adopted by respondents. He states he prepared the resolutions in a clerical capacity, not advising the board as to the action it should take. His attitude was to remain neutral, and he only advised the board upon a direct request from them. Among other things, he advised the committee it might legally open the box from precinct No. 2 if satisfied with the sufficiency of the seal, that it was for the committee to determine whether or not the seal would answer the purpose of an official seal, and also advised it that the box from Limestone township was not a

Digitized by Google

proper ballot box to be opened. Mr. Simmons also appeared as attorney of record for said respondents in mandamus proceedings brought by Thomas B. Wyman *et al.* against the respondents herein, in this court, relative to their action in connection with the recount of the ballots cast at said election in Mathias township, which action is still pending, but he took no active part in the case at any time. He was not requested by relators to permit his name to be used in bringing these proceedings, never refused to permit his name to be used, and testified that he officially held no views adverse to relators' position in this proceeding."

The contentions made and decided in the court below involve the right of relators to institute the proceeding, the conclusiveness of the supervisors' action, the propriety of the remedy sought, and the powers of the board of supervisors in recounting votes.

Upon the facts found by the court, which are controlling, it was properly held that relators might institute the proceeding, and that mandamus was a proper remedy. In *Ayres* v. *Board of State Auditors*, 42 Mich. 422, 429 (4 N. W. 274, 279), this court said:

"The rule which rejects the intervention of private complainants against public grievances is one of discretion, and not of law. There are serious objections against allowing mere interlopers to meddle with the affairs of the State, and it is not usually allowed unless under circumstances where the public injury by its refusal will be serious. In the cases of *People, ex rel. Drake,* v. *Regents of the University,* 4 Mich. 98, and *People, ex rel. Russell,* v. *Inspectors and Agent of the State Prison,* 4 Mich. 187, the court took pains to guard against any decision that would prevent complaint by a private relator, where the public interests require prompt action, and where the public prosecutors will not interfere. There is, as there shown, more liberality in some States than in others. But we find no reason to consider the matter as one lying outside of judicial discretion, which is always involved in mandamus cases concerning the relief as well as other questions."

Digitized by Google

See, also, *Giddings* v. *Secretary of State*, 93 Mich. 1 (52 N. W. 944, 16 L. R. A. 402).

The almost even division of the electors upon the question in issue in the election is manifest from the vote which was cast, "indicating," to use the language of the circuit judge, "that the interest of the electors was general and intense." Under the circumstances disclosed, the discretion of the court was properly exercised in permitting citizens to institute this proceeding.

The relief sought by relators was not merely the setting aside of the determination of the board of supervisors. Affirmative action of the board was sought, including a determination and resolution and record which would have the effect of suspending the operation of the general liquor law of the State in the county of Alger. The duty of the board in canvassing returns and in recounting votes is ministerial. Assuming that the board acted beyond its powers in recounting the ballots in certain precincts, its plain duty was to declare a result other than the one complained of, and to pass and spread upon the record of the proceedings the appropriate resolution. To this end the writ of mandamus is the appropriate, and indeed the only, remedy of persons aggrieved by the unlawful action of the board.

The principal contention of relators is that the board had no power to open and recount the ballots found in a ballot box not closed and sealed in conformity with statutory requirements. This is a contention presented, but held not to be involved, and not determined, in *Alward* v. *Board of Supervisors*, 187 Mich. 573 (153 N. W. 1001).

There is a general law, according to which liquors may be manufactured and sold, in force in every county in the State, unless by the votes of the electors of the county its operation is locally suspended, and such

Digitized by Google

manufacture and sale is prohibited in the county. The vote being in the affirmative, it is the duty of the board of supervisors to declare that from and after the 1st day of May succeeding the election it shall be unlawful to manufacture or sell liquors in the county. It is the duty of the board of supervisors to canvass the votes and declare the result of the election. In *Paul* v. *Circuit Judge,* 169 Mich. 452 (135 N. W. 283), it was held that the vote was the vital thing; the ministerial duty of the board to pass or not to pass the statutory preamble and resolution and publish the same depending upon the vote. Prior to the year 1913 no recount of such votes was provided for. The conclusion of the board, fraud or apparent mistake being excluded, was final. *Thomas* v. *Abbott,* 105 Mich. 687 (63 N. W. 984); *Haehnle Brewing Co.* v. *Board of Supervisors,* 156 Mich. 493 (121 N. W. 209).

Various provisions of the law are calculated, if obeyed, to preserve ballots cast at an election so that they may be re-examined and recounted. There is in the general election law (1 Comp. Laws, §3725) a provision for a recount of votes. Power is given to canvassing boards, upon proper petitions being filed, to investigate the facts set forth in the petitions, to cause the ballot boxes used in the contested districts to be brought before the board, to make up a committee to recount, to open the ballot boxes and make a recount thereof, and make returns in writing to the canvassing boards. Considering these provisions, it was held that a recount could be had only in cases where the recounting board could find, from an inspection of the ballot box, that the statutory requirements for the preservation of the ballots, as cast, had been observed. *May* v. *Board of Canvassers,* 94 Mich. 505, 511 (54 N. W. 377); *Keith* v. *Wendt,* 144 Mich. 49 (107 N. W. 443); *Ward* v. *Culver,* 144 Mich. 57 (107 N. W. 444). The primary election law (Act No. 4, Extra Session

Digitized by Google

1907, and Act No. 281, Pub. Acts 1909) provides for a recount of votes. *Ritze* v. *Board of Canvassers*, 172 Mich. 423 (137 N. W. 964). See, also, *Bradley* v. *Board of State Canvassers*, 154 Mich. 274 (117 N. W. 649). In *Keith* v. *Wendt, supra*, it was said:

"We held, in *May* v. *Board of Canvassers of Wayne Co.*, 94 Mich. 511 [54 N. W. 377], that, where it claimed that the ballot box had been tampered with, it was the duty of the board to cause the box to be brought before it and make an investigation. It was also said that such investigation would be confined to an inspection of the box itself. It was not determined in terms that the board must, as a prerequisite to a recount, find that the box had been sealed as the statute requires; but we think such a view was foreshadowed. Further consideration has strengthened our belief that there can be no certainty in proceedings under this statute, if boards are permitted to set up standards of their own in regard to the steps necessary for the preservation of the ballots cast. The test must be this: Have the ballots been preserved as the law directs?"

In *Ritze* v. *Board of Canvassers, supra*, it was said:

"The board of canvassers took the testimony of the primary election inspectors with reference to the condition of the box. They likewise compared the poll list used in said precinct with the enrollment book. They had no authority to do either."

The law of the State being as here indicated, the legislature in 1913 made certain changes in the statutes. By Act No. 352, Pub. Acts 1913, the law which provides for the election of boards of county canvassers and defines their duties was amended so as to provide that any candidate voted for at an election, or any qualified elector voting at the last preceding election, where a constitutional amendment or any other proposition had been voted on, may secure a recount of votes, and for this purpose the board is given power to cause ballot boxes to be brought before it and make

Digitized by Google

a recount. No power is conferred to subpœna witnesses or to do more than recount the votes. But the returns made by the board upon recount are deemed to be correct, anything in the previous returns from said township, ward, or district to the contrary notwithstanding; and for error apparent upon the face of the returns they may be "examined and corrected upon certiorari to the circuit court of the county." Act No. 320, Pub. Acts 1913, is entitled:

"An act to provide for a recount of votes cast at an election for candidates for office, or proposed amendments to the Constitution or any other question or proposition which are canvassed by the board of State canvassers."

This act empowers the board of State canvassers to recount votes and to require "any inspector of election, county officer, or other person, to appear for any such purpose as may be desired," to demand and cause the ballot boxes "and returns in connection with any such election to be brought before it."

"The returns made by the said board of State canvassers of any recount shall be deemed to be correct, anything in the return of any board of election inspectors, or any county or district canvassing board to the contrary notwithstanding."

Act No. 327, Pub. Acts 1913, is entitled:

"An act to provide for a recount of votes canvassed by boards of supervisors."

It contains three sections. In the first it is provided that, whenever a proposition is submitted to the electors, and the votes cast are canvassed by the board of supervisors of the county, any person voting in the county at the election who considers himself aggrieved "on account of any fraud or mistake in the canvass of the votes by inspectors of election or the returns made by said inspectors," may ask for, and, upon complying with certain conditions, may have, a correction

Digitized by Google

of the mistakes or frauds complained of. The petition must be in writing, and set forth as near as may be the nature of the mistakes or frauds. By section 2 it is made the duty of the supervisors to appoint a committee from its members—

"to investigate the facts set forth in said petition. For such purpose the said board shall have power to cause the ballot boxes used in such election districts to be brought before said committee. Said committee shall thereupon in some public place where the persons interested, and their counsel, if they so desire, may be present, proceed forthwith to open the ballot boxes from such districts, townships or wards and to make a recount thereof as to said proposition, and for the purpose of recounting the votes upon said question, said board shall have the right to subpœna witnesses, administer oaths, and take all necessary proceedings to insure a correct count of the votes cast upon the proposition and make correct and full return in writing under their hands to said board, showing the full number of votes given, the number of votes in favor of said proposition, and the number of votes against said proposition. As soon as the recount is completed, said board shall at once return the ballots to their respective boxes, carefully fasten and seal the same, and deliver them to the officer having the care and custody thereof. The returns made by the said board of supervisors upon recount shall be deemed to be correct, anything in the previous return from such township, ward or district to the contrary notwithstanding."

By section 3 it is provided that:

"Any person may, for error apparent upon the face of the returns, have the same examined and corrected upon certiorari to the circuit court of said county according to the rules and practices applicable to such rights. * * * For fraudulent or illegal voting or tampering with the ballot boxes before a recount by the board of supervisors, all legal remedies now existing shall remain in full force."

It is Act No. 327 that we are concerned about, and the others have been referred to for the purpose of

Digitized by Google

contrasting the provisions for a recount of votes, and to show that, so far as intention can be determined from language, it was the intention of the legislature to give to boards of supervisors in recounting votes canvassed by such boards greater powers than are given to the recounting boards referred to in the other statutes. Some effect must be given to the provision that:

"For the purpose of recounting the votes upon said question, said board shall have the right to subpœna witnesses, administer oaths, and take all necessary proceedings to insure a correct count of the votes cast upon the proposition."

It may be assumed that the legislature intended a speedy determination of the results of local option elections. It is notorious that ballot boxes used at elections are not secured with their contents, in the statute manner. As has been stated, it was the law when the statute in question was passed that, unless it appeared that the ballots had been so secured, they could not be recounted; that the recounting boards were not authorized to ascertain whether, in fact, the statute precautions for the preservation of ballots having been omitted, the original ballots had been preserved. What possible purpose could be subserved in empowering boards to subpœna witnesses, administer oaths, and take all necessary proceedings to insure a correct count of the votes, if, as theretofore, the evidences of the lack of statutory sealing of the boxes was conclusive of the right to recount the votes? It is plain, in my opinion, that the legislature intended in this act to abolish the test, "Have the ballots been preserved as the law directs?" and to substitute therefor the test one of pure fact, "Have the ballots been, in fact, preserved, notwithstanding the failure to observe the legal requirements for their preservation?" Satisfied by the evidence that the original ballots canvassed by the inspec-

Digitized by Google

tors of election, and all of them, and no others, are in fact in the box, the board may recount them. Satisfied that they cannot perform the purely ministerial duty of recounting the original ballots in a particular box, they must accept the returns of the election inspectors. This meaning gives effect to the general purpose and all of the provisions of the act. No judicial powers are given to the board. It is not a novel thing to give to boards and commissions power to determine facts and to determine them finally.

In concluding his findings, the learned circuit judge, in agreement with the views I have expressed, said:

"It thus appears that the act in question was intended to and does confer upon the board of supervisors, in recount proceedings, power more like that possessed by courts in *quo warranto* proceedings than that of the usual board of canvassers; that the board is not confined to the determination of questions regarding the formality of sealing the box, but may make an investigation and determination of all questions pertaining to the integrity of the ballots in the precincts for which recount petitions are filed, for the purpose of making a correct count of the votes *cast* in such precincts; that in the decision of all questions of fact in connection with its investigations of fraud or error the determination of the board is final and conclusive, and not subject to review by the courts.

"In the case at bar it appears the board made an inspection of the boxes from Limestone township and precincts Nos. 2 and 3 of Munising township, and took testimony as to the latter. No objection was made to their being opened, except for formal defects as to the condition of the boxes or the manner of sealing. There was no indication or claim made before the board that they had been tampered with in any way. The board determined to and did open the boxes, made the recount, and adopted the result formally. It thereby passed upon the integrity of the ballots and declared them intact and inviolate. This decision, being purely one of fact, whether right or wrong, is conclusive upon this court. (It might be remarked incidentally that there was no evidence on the hearing of the instant

Digitized by Google

case to show that the ballots had been tampered with or changed since the election.)

"Having authority, under the statute, to pass upon such question and to make the count of the ballots in such boxes, and it not appearing that the recount itself was erroneous (in fact, no question is raised as to the accuracy of the count of the ballots) the determination of the board must stand."

The judgment is affirmed, but without costs.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

GOURLAY *v.* INSURANCE COMPANY OF NORTH AMERICA.

1. APPEAL AND ERROR—DIVIDED COURT—RES JUDICATA—LAW OF CASE.

While a decision by an equally divided court may not be conclusive in other subsequent causes, having different parties, it operates as a rule of law binding upon the same litigants in a later appeal; hence, after such opinion sustaining the trial court which overruled a demurrer to plaintiff's declaration, the Supreme Court will treat the parties as concluded by the determination in the former appellate proceedings upon a review of the evidence offered in support of plaintiff's averments.

2. INSURANCE—BURDEN OF PROOF—WANT OF CONSIDERATION—EVIDENCE.

In an action upon an insurance policy the burden was not upon plaintiff to show a consideration for attaching a loss payable clause stating that the insurance should be payable to the insured or his vendor as their interests might appear; it rested upon the defendant to establish its contention if it relied upon lack of consideration,—an affirmative defense.

Digitized by Google

Error to Eaton; Smith, J. Submitted October 20, 1915. (Docket No. 35.) Decided December 21, 1915.

Assumpsit by Joseph G. Gourlay and another against the Insurance Company of North America on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Walters & Hicks, for appellant.

Cummins & Nichols, for appellees.

OSTRANDER, J. This cause was here upon demurrer. The demurrer challenged the right of plaintiffs to recover upon the policy of insurance and the facts alleged in the declaration. The trial court overruled the demurrer, resolving against defendant every point relied upon. The judgment of the trial court was affirmed by this court, the justices being evenly divided. 181 Mich. 286 (148 N. W. 258). The judgment of this court was that the judgment below be affirmed. A rehearing was denied.

Defendant pleaded issuably and the cause was tried, resulting in a judgment for plaintiffs; plaintiffs proving, substantially, the facts stated in their declaration. In seeking a review of the judgment, no questions are presented which were not involved upon the consideration of the demurrer. (A claim and concession appear which will be noticed later.) It is said by appellant that because the judges were evenly divided upon the questions of law presented upon the hearing of the demurrer, so that by operation of law the judgment of the lower court was affirmed, no controlling rule of law and no controlling decision of the questions now presented were announced. Undoubtedly, no rule was made by the decision for other like cases. It may be conceded, too, that this court has the power to now reverse its former judgment and, for that purpose

Digitized by Google

power to consider again the questions and arguments heretofore and now presented by appellant.

It has been the practice to regard the judgment of this court when entered of necessity and not by a concurrence of the opinions of the justices as no different, in effect, from a judgment entered by the vote of a majority of the justices. As was said in *Lyon* v. *Circuit Judge*, 37 Mich. 377:

"The same reasons of public policy, in favor of the conclusiveness of the judgment, apply to such cases as to others. The case has been heard and determined, and the public interest and the interest of the parties alike demands that there shall be an end of litigation."

There has been no departure from this rule. There are exceptions, as when a prior decision is erroneous, recognized in some of the States; but the weight of authority and of reason is in support of the rule that a prior decision is conclusive of the same question on a subsequent appeal; is the law of the case. See the cases collected in a note, 34 L. R. A. 321.

Conceding this to be the rule, what difference does it make that the former judgment of this court was entered upon a demurrer to the declaration, which demurrer denied the right of plaintiffs to recover upon the state of facts alleged in the declaration? No good reason is suggested for holding the judgment of this court conclusive in one case and not in the other, although counsel for appellant plausibly urge various reasons for so doing. In the last analysis, the argument is, and in any like case it must be, addressed to the proposition that the former decision was erroneous, for whatever reason entered, and that by a concurrence of opinion the justices should have agreed to a different conclusion and result.

It is conceded by appellees that one question is open to appellant, which is whether there was consideration for the addition to the policy of the loss payable clause.

Digitized by Google

As ground for a directed verdict in its favor, defendant urged:

"*Ninth.* That the 'loss payable' clause attached to the policy of insurance declared upon was attached after the issuance of said policy, and that no consideration passed from the plaintiff to the defendant which could support a policy running to the plaintiffs.

"*Tenth.* That no consideration passed from plaintiff to defendant at the time the 'loss payable' clause was attached, which would support a waiver of defendant's rights under the policy of insurance sued upon."

It is said by appellant, in argument:

"There is no escape from the conclusion that, if a new insured party is brought into the policy contract by the loss payable clause, then there must be a new consideration shown therefor, for the entering into of the new contract, and for the waiver by the company of the important safety clauses of the policy."

The point is not open, is ruled by the former decision and judgment. The language employed in the opinion of Mr. Justice MOORE affirms the right of the plaintiffs to recover upon the policy of insurance in view of the facts alleged and proven. As I read it, it cannot be construed as making plaintiffs' right to recover dependent upon proof of any new consideration moving to defendant for attaching the rider, whatever the legal consequences of attaching it may be.

Assuming the question to be undecided, and important as a question of fact, upon whom rested the obligation to prove a want of consideration? Not upon the plaintiffs. Defendant offered no testimony, and elicited none from plaintiffs, tending to prove a want of consideration.

It follows that the judgment must be, and it is, affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

LITTLEWOOD *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—NEGLIGENCE—DEATH — AUTOMOBILES — CONTRIBUTORY NEGLIGENCE.

   In an action for the negligent killing of plaintiff's intestate, at a crossing, evidence that the deceased stopped his automobile three or four yards from the interurban track, that the view was obstructed by a house in the direction from which the car approached, that when he saw the car he tried to back up, but his automobile went ahead then started back, and that the interurban car was operated at a speed of about 50 miles an hour, without signals of any kind, though one of plaintiff's witnesses testified that the automobile was only seven or eight inches from the car track when it stopped, supported a verdict for plaintiff and raised an issue of fact as to the questions of negligence and contributory negligence.

2. SAME—EVIDENCE.

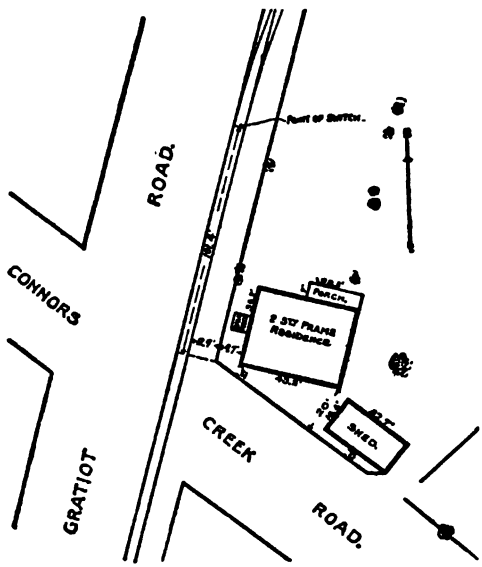
   That the testimony of the witnesses was negative rather than affirmative upon the subject of sounding the signals, did not require the court to direct a verdict, when it was uncontradicted by any testimony offered by defendant railway company.

Error to Wayne; Van Zile, J. Submitted October 21, 1915. (Docket No. 43.) Decided December 21, 1915.

Case by Margaret H. Littlewood, as special administratrix of the estate of Charles F. Littlewood, deceased, against the Detroit United Railway for the unlawful killing of the plaintiff's intestate. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the blueprint referred to in the opinion.

Digitized by Google



Corliss, Leete & Moody (*Frederic T. Harward*, of counsel), for appellant.

Bishop & Kilpatrick, for appellee.

STONE, J. This is an action to recover damages for injuries sustained by plaintiff's decedent, resulting in his death two days after the injuries complained of, and in the destruction of his automobile, occasioned by a collision of an interurban car belonging to the defendant with the automobile owned and being driven by plaintiff's decedent on August 31, 1913, on Connors Creek road, at its intersection with Gratiot road, in Wayne county. Plaintiff's decedent and husband was 50 years of age. On the day of the accident he had been engaged in carrying passengers, for hire, in his automobile, which had been his business for some time. He was familiar with the crossing and location. About 4 o'clock in the afternoon of said day plaintiff's decedent was driving alone in his automobile northerly

Digitized by Google

on Connors Creek road toward its intersection with Gratiot road. The attached blueprint is taken from the record, and will aid in understanding the *locus in quo*, and its surroundings. Connors Creek road runs in a northwesterly direction, although the witnesses speak of it as running north. It is 50 feet wide. Gratiot road runs northeasterly, and is 55 feet wide. The house spoken of as the "Trombley house" is a two-story frame dwelling situated on the northeast corner of these roads. It is 9.7 feet from the front of this house to the easterly lot line of Gratiot road, and 12.9 feet from said lot line to the first rail of the interurban track upon Gratiot road, making 22.6 feet from the front of the house to the easterly rail of the car track. The switch is northerly of the intersection. It is 101.4 feet from the southerly point of the switch—that is, the point nearest to Detroit—to Connors Creek road, and 597.6 feet from the northerly point of the switch, that is, the point nearest Mt. Clemens, to said Connors Creek road. Vanderbeck's saloon was situated on the southwest corner of the roads, with steps fronting on Gratiot road.

The declaration, after stating the duty of the defendant, alleges that its servants, agents, and employees did not exercise reasonable care, caution, and diligence, in that they did not ring a bell or sound a gong, or give any notice or warning of the approach of said car, and did not approach with care and caution, and did not have said car under control, and did not stop said car when plaintiff's intestate with said automobile was being driven, or about to be driven, upon said track; that the crossing was of a dangerous character, and that the defendant did not when approaching said Connors Creek road keep any lookout or keep said car under control so that it could be immediately stopped and controlled; that there were obstructions in the nature of buildings adjacent to said intersection,

Digitized by Google

and that defendant did not provide any safe, adequate, and effective signal to warn the public and plaintiff's intestate of the approach of said car, failed to employ and station a watchman, or to install gates at said dangerous crossing, or to take any other safe, adequate, and effective means to protect the public and plaintiff's intestate from danger and injury arising from the operating and running of its said cars on Gratiot avenue. The declaration proceeds in the following language; and plaintiff avers that on the day and year aforesaid the defendant, its

"agents, servants, and employees, wholly disregarding their duty in the premises, and while plaintiff's intestate was lawfully operating and driving his automobile as aforesaid, and without any notice or warning, and without ringing a bell or sounding a gong, and in total and utter disregard of the rights of plaintiff's intestate, and without his knowledge, carelessly, negligently, wilfully, and recklessly propelled said car towards plaintiff's said intestate on said Gratiot avenue at a rate of speed, to wit, 50 miles per hour, causing said car to run into and collide with said automobile and plaintiff's said intestate, whereby said intestate was then and there violently hurled and thrown with great force and violence out of said automobile and upon the ground adjacent to said car track,"

alleging that he received injuries from which he died two days thereafter.

The witnesses to the collision who testified were either sitting upon the steps in front of Vanderbeck's saloon or near by.

At the close of plaintiff's case defendant's counsel moved the court for a directed verdict in its favor on the grounds that the plaintiff's decedent was guilty of contributory negligence, and that the defendant had not been shown guilty of any negligence. The court refused to grant this motion, to which ruling defendant duly excepted, and the case was thereupon, without any evidence upon the part of the defendant, sub-

Digitized by Google

mitted to the jury upon the questions whether plaintiff's decedent approached the crossing with the care which a reasonably prudent man would have used under the circumstances, and whether defendant was guilty of negligence.

It was the contention of the defendant, in the court below and in this court, that the record shows, as matter of law, that plaintiff's decedent did not use that care in approaching this crossing in his automobile which the law requires; and it is upon the alleged error of the court in refusing to direct a verdict upon the grounds aforesaid, as requested by defendant's counsel, that the case is before this court. The trial resulted in a verdict for the plaintiff for $3,635 damages.

The eyewitnesses who testified were foreigners—Belgians—and it is evident, from a perusal of the record, that they did not readily understand the English language, and there is considerable confusion in their testimony.

Upon the question of contributory negligence, it is the claim of defendant, gathered from the testimony of plaintiff's witnesses, from the blueprint, and certain photographs that were offered in evidence, that it is undisputed that, when the plaintiff's decedent made his first stop, he was not out from behind the Trombley house; that he drove up toward the track without stopping after he got out from behind the Trombley house until he was within 7 or 8 inches of the track, and within the danger zone; also, it is urged that it appears from the record that decedent not only failed to look for a car after getting out from behind Trombley's house, where he could have seen one, but proceeded either upon or so close to the track that he was hit by the car, which was within 100 feet or less of him when he neared the track, and whose approach then, by a mere glance to the right, he would have detected had he been in the exercise of ordinary care.

Digitized by Google

The question of the contributory negligence of plaintiff's decedent was first discussed by counsel. In order for the defendant to prevail upon this point, it must appear, taking the most favorable view of the testimony of plaintiff's witnesses, that there was no evidence of the exercise on the part of plaintiff's decedent of the care which a reasonably prudent person would be expected to use under the circumstances.

Ella Blumdele, one of the principal witnesses for the plaintiff, testified that at the time of the collision she was sitting on the front steps of Vanderbeck's saloon with Mrs. Vanderbeck and another witness, who had died before the trial. She testified that she saw the plaintiff's decedent approaching the intersection of the roads, riding in his automobile, coming in a northwesterly direction; that he was running pretty slow. In her direct examination the following occurs:

"*Q.* How was it running when you saw it, Mrs. Blumdele?

"*A.* Pretty slow.

"*Q.* What did it do when it came up towards the car track?

"*A.* Well, at the corner of the house he stopped and he looked. He seen nothing, and he ran a little further. Then he stopped again. Then he started ahead a little further, and the car catch him. He stop the machine.

"*Defendant's Counsel:* What is that; I didn't understand that?

(The answer was repeated by the stenographer.)

"*A.* (Continuing.) When he was there a few yards away from the car track he stopped his machine. He did not see anything, and he started again. When he came near to the car track, he stopped again, and he tried to brake this machine, to back up, but the car hit him.

"*Q.* Where was the street car when you first saw it?

"*A.* On the switch.

"*Plaintiff's Counsel:* Ask her that again.

(The question was here repeated by the stenographer.)

Digitized by Google

"*A.* I couldn't exactly tell you how far it was.
"*Q.* Was it near the switch?
"*A.* Yes.
"*Q.* Did you know there was a switch up above there, did you?
"*A.* Yes; it comes near to Trombley's house there.
"*Q.* How fast was the street car going when you saw it first?
"*A.* It was pretty fast. * * *
"*Q.* This automobile when it was coming on Connors Creek road towards you, can you tell how fast it was going before it stopped?
"*A.* Just like a horse would run, easily.
"*Q.* Where did it stop first?
"*A.* Three or four yards away from the road.
"*Q.* Well, do you mean the street car track?
"*A.* Yes.
"*Q.* When the automobile stopped, what did the man do at the time?
"*A.* He looked up the way to Mt. Clemens, and he looks that way.
"*Q.* Then what did he do?
"*A.* Well, he started again.
"*Q.* He started his machine up?
"*A.* Yes.
"*Q.* How far did he go then?
"*A.* Well, not far from the track; close to the track.
"*Q.* Did he get his machine up close to the track?
"*A.* Yes.
"*The Court:* No; ask her if he got his machine up on the track.
"*A.* No; he was not on the rails yet.
"*Q.* When the street car hit him, where was the automobile?
"*A.* Just struck the track then.
"*Q.* Was his automobile moving or was it standing still when the street car hit it?
"*A.* He was standing still.
"*Q.* What was the man in the automobile doing when his car was on the street car track?
"*A.* He did something with his feet.
"*Q.* How much of the automobile was over on the street car track; could you tell?
"*A.* About four or five fingers.

Digitized by Google

"Q. What part of the automobile was on the street car track?
"A. The front."

This witness afterwards testified that the car, as it approached, was running at least 50 miles an hour and hit the automobile; and she described how the automobile was struck and demolished and the car thrown from the track.

"Q. Did this street car that came down here and hit the automobile give any alarm or blow any whistle?
"A. I didn't hear nothing. I was looking at the street car when the automobile was there. I was near enough to the street car to hear it if it blew a whistle. There was nothing between me and the street car that was coming. It was a nice day. The sun was shining."

Upon cross-examination this witness testified, among other things, as follows:

"* * * The track is perfectly straight along there towards Mt. Clemens.
"Q. Well, now, when you saw the automobile first, how far from the track was it?
"A. There was a big tree there.
"Q. How far would that be; how many yards?
"A. I don't know; I didn't measure it.
"Q. Well, you seem quite expert. How far would you say; how many yards?
"A. I don't know; I couldn't tell you that.
"Q. How far in this room; as far from you over to the end of the room?
"A. I couldn't tell you; I don't know.
"Q. Do you know how far the tree is? Would it be as far from you as to the clock there on the wall?
"A. Yes; I guess so; so far as from here to the wall. (The record shows that the deputy sheriff measured the distance and found it to be 52 feet.)
"Q. You saw that automobile that distance away from the track? Where was the street car then?
"A. I didn't see the street car at that time. I could not exactly tell you where the street car was then.
"Q. Was it in sight?

Digitized by Google

"*A.* I couldn't tell you that; I didn't see it.
"*Q.* Well, did the automobile come right on?
"*A.* No; he stopped first.
"*Q.* Well, how far from the track did he stop?
"*A.* Three or four yards.
"*Q.* Twelve or fifteen feet?
"*A.* Yes.
"*Q.* Well, was he out from behind Trombley's house when he stopped?
"*A.* No; no; he was not behind Trombley's house when he first stopped. He could see the car.
"*Q.* Did you see the car then?
"*A.* I didn't look at the street car at that time.
"*Q.* Had you seen the street car then?
"*A.* No; I didn't see her yet.
"*Q.* Well, after that time did he go right over to the track, or did he stop again?
"*A.* He stopped again.
"*Q.* Where was that when he stopped again?
"*A.* Close by the track.
"*Q.* Was he on the track the last time that he stopped there; the second or the next time after he stopped, was he then on the track?
"*A.* Four or five fingers from the track.
"*Q.* What does she mean by four or five fingers?
"*A.* Why, put your hand like this (indicating); four or five fingers like that.
"*Q.* Was the front of the automobile on the track?
"*A.* No; he was not on it yet. * * *
"*Q.* Was there any part of his machine on the track?
"*A.* No.
"*Q.* But you put your hands up how far the front of the automobile was from the rail?
"*A.* (Witness indicates.)
"*Q.* The very front?
"*A.* Like that (indicating).
"*The Court:* About six or eight inches.
"*Q.* About six or eight inches? Well, now, where was the car then?
"*A.* She was then on the switch. I have seen her then.
"*Q.* What did she say then? When this man came up in the automobile and stopped there, you say four or five fingers from the track, the street car, you say,

Digitized by Google

was then at the switch; that is the end of the switch nearest you; is that right?

"*A.* Yes.

"*Q.* Was that the first time that you had seen the street car?

"*A.* Yes.

"*Q.* And it was one hundred feet? By this map it was one hundred and one feet away. Now, you say it was coming fifty miles an hour, do you?

"*A.* Yes. * * *

"*Q.* Now, let's see if we understand each other. This man came up, and he stopped about three or four yards from the track.

"*The Court:* No; five yards the first time.

"*Plaintiff's Counsel:* No; three or four, your honor.

"*Defendant's Counsel:* Three or four.

"*Q.* Now, this man is coming north on Connors Creek road—the man in the automobile?

"*A.* Yes; towards the track.

"*Q.* You saw him when he was fifty-four feet away, as far as from you to that wall?

"*A.* Yes.

"*Q.* He was coming slowly, you say, very slowly?

"*A.* Very slow.

"*Q.* What kind of an automobile did he have, an open car or a closed car, or what?

"*A.* It was an open car.

"*Q.* And he came up towards the track? When he was three or four yards from the track you say he stopped?

"*A.* The first time; yes.

"*Q.* You did not know where the car was then?

"*A.* No.

"*Q.* You did not see the car; you did not look at the car?

"*A.* No, sir.

"*Q.* Meaning the street car, did you?

"*A.* No, sir.

"*Q.* Then the man came right on, and he stopped when the front of his car was, say a foot, from the track?

"*A.* Yes. * * *

"*Q.* When he came to a stop the second time the street car was on the switch?

Digitized by Google

"*A.* Yes, sir.

"*Q.* Coming down at 50 miles an hour; is that right?

"*A.* Yes, sir.

"*Q.* It struck the automobile while it was in that position; is that right? The street car hit the automobile while the automobile was, as you say, that far from the track, about eight inches?

"*A.* No; this man saw the street car coming, and he tried to back up. I think it was, something what he tried to do with his feet. But, in place of when the machine was there going backwards, she went a little frontwards, then started back. Then he was hit.

"*Q.* Well, then, the way it looked to you that the man in the automobile did not see the street car until he was up there about six or seven inches from the track; is that right? (Strike that out.) When he saw the street car, what did the automobile man do?

"*A.* That is it; he tried to press something down with his foot. * * *

"*Q.* So that, when this man in the automobile, Mrs. Blumdele, stopped the first time, he could not see up the track, could he?

"*A.* Well, he could see the switch, though, but not very far.

"*Q.* You could not see very far up the track until you got beyond the porch?

"*A.* No.

"*Q.* This man didn't stop again with his automobile until he got up within eight inches of the track, did he?

"*A.* When he came eight inches from the track.

"*Q.* When this man stopped his automobile the first time, what did he do?

"*A.* He looked.

"*Q.* Which way did he look?

"*A.* On the side of Trombley's house.

"*Q.* Then at the time did you see the street car?

"*A.* No."

This testimony is followed by that of the witness Mary Vanderbeck. From the testimony of this witness counsel for defendant contends that it appears that plaintiff's decedent made no stop until he was about seven inches from the track. It appears, however, that this witness testified that the driver stopped

Digitized by Google

his automobile near the fence, and, although it is true she used the expression "six or seven inches" in estimating the distance from the track, she later testified that she did not know how long a foot was. In her cross-examination the following appears:

"*Q.* And then he gets within six or seven inches of the track—

"*A.* Until he gets up to the fence.

"*Q.* Well, is it the fence now?

"*A.* That is, the front part; it is the front part. The fence is the front part of Trombley's house.

"*Q.* What does he do when he gets to the fence?

"*A.* He stopped and looked.

"*Q.* How far was he from the track?

"*A.* It is almost up to the track; the fence and the car track is almost together.

"*Q.* The fence is not on the track?

"*A.* No; it is a very little between, when he started up again. * * *

"*Q.* Did he stop twice before he got to the railroad track?

"*A.* No; he came along slowly.

"*Q.* You say he stopped by the fence down there?

"*A.* That is the fence, is near to the track.

"*Q.* Is near to the car track?

"*A.* Yes, sir.

"*Q.* But it is not six or seven inches.

"*A.* It looks to me it is that much.

"*Q.* There would not be any fence there along if it was six or seven inches from the track?

"*A.* I couldn't tell you exactly.

"*Q.* That is the only time he stopped, was it?

"*A.* He stopped right close on the corner, right on the corner.

"*Q.* Close to the car track?

"*A.* Close to the car track."

The plaintiff claims that there was evidence showing that the plaintiff's decedent stopped and made his first observation after he had passed from behind the Trombley house, being at a point less than 22.6 feet from the nearest rail, and variously described by the witnesses as being 3 or 4 yards from the rail, or be-

Digitized by Google

yond the corner of the house, or near the fence; that he made the first stop at a proper point of observation, and, although he looked, he did not see the car, the inference being that the car was not then in sight. There was evidence that there was a northbound car on the side track at the time, although the photographs, taken 20 days later, do not show this car. The court, counsel, and jury visited the place of the accident and viewed the premises. The solution of the question of contributory negligence is found in the answer to the question: Did plaintiff's decedent do what a reasonably prudent man would have done under the circumstances?

1. Confusing as some of the testimony is, we are unable to say that there was no evidence tending to show that plaintiff's decedent stopped his car and looked in the direction of Mt. Clemens when within 3 or 4 yards of the first rail of the track; in fact, there is positive testimony that he did so stop and look. If he stopped and looked at that place, and saw no car approaching, we cannot say, as matter of law, that he did not act as an ordinarily prudent person should in then proceeding toward the track. *Palmer* v. *Railroad Co.*, 56 Mich. 1 (22 N. W. 88); *Coffee* v. *Railroad Co.*, 139 Mich. 378-381 (102 N. W. 953). The evidence is undisputed that, when he made his final stop, he endeavored to move his car backward, but that, in the confusion, it went forward and then back. He doubtless saw his perilous condition at that time, and was unable to extricate himself. In our opinion, the question of contributory negligence was one for the jury, and the trial court did not err in submitting it as a question of fact.

2. Upon the subject of signals two other witnesses besides Mrs. Blumdele testified that they heard no signal. One of such witnesses testified.

"He didn't blow; me think the car did not blow, or

Digitized by Google

I hear it that way. If a car blow, me think I can hear it right away. It was nice weather; there was no wind. I didn't hear any blow."

There seems to be no question upon this record that the speed of this car as it approached the automobile was from 50 to 60 miles an hour. Counsel for defendant urged that this court had held that it was not *per se* negligence for cars to run at the rate this car was shown to have been running, and cites cases, including that of *Folkmire* v. *Railways Co.*, 157 Mich. 159 (121 N. W. 811, 17 Am. & Eng. Ann. Cas. 979). It is true that in that case this court held that the rate of speed of 40 or 50 miles an hour was not *per se* negligence, but the court further said it did not follow that it was not negligence; that that must depend upon other considerations. In that case Justice HOOKER, speaking for the court, said:

"Counsel say that we have decided that it is not negligence to drive a car at a high rate of speed in the country, citing the cases of *Robinson* v. *Railroad Co.*, 79 Mich. 328 [44 N. W. 779, 19 Am. St. Rep. 174]; *Shufelt* v. *Railroad Co.*, 96 Mich. 329 [55 N. W. 1013]; *Tobias* v. *Railroad Co.*, 103 Mich. 339 [61 N. W. 514]. These cases do not hold that the exigencies of modern travel require rapid transit, and sustain the statement hereinbefore made that a steam car is not necessarily negligently run when a high rate of speed is attained, and that speed alone is not *per se* negligence. It does not follow that a rate of speed making it impossible to get off from a track in safety after it is possible to discover a car is not a negligent rate of speed, nor that it is not negligent to maintain a highway crossing exceptionally dangerous without some provision for preventing such accidents. It is true that the whistle and incessant ringing of the bell, together with the noise accompanying a heavy train on a steam road, has generally been deemed sufficient care without placing flagmen or electric bells on the crossings, but there are cases where the contrary has been held."

Digitized by Google

We are not aware that this court has ever held that it might not be negligence to run a car in a public highway, over a frequented crossing, even in the country, at a rate of speed of 50 miles an hour, without signals of any kind. But it is urged by counsel for defendant that there was no evidence here that the whistle was not sounded or signal given; the only evidence being negative evidence. We are not prepared to say that this evidence, standing uncontradicted, is no evidence to be submitted to the jury, in the absence of affirmative evidence opposed to it. In our opinion, the question of negligence was properly submitted to the jury.

We find no reversible error in the record, and the judgment below is affirmed.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

CARLSON *v.* WYMAN.

APPEAL AND ERROR—CERTIORARI—INTOXICATING LIQUORS—MOOT POINT.

A cause that presents only a moot point, relating to merely abstract questions of law, will not be passed upon by the Supreme Court; hence, on certiorari to review mandamus proceedings in which the court denied the writ of mandamus to compel village officials to approve relator's liquor bond, this court will not decide the point after expiration of the period covered by the license.

Digitized by Google

Certiorari to Alger; Fead, J. Submitted October 27, 1915. (Calendar No. 26,699.) Decided December 21, 1915.

Mandamus by Charles J. Carlson against Thomas B. Wyman and others to compel the respondents to approve the bond and liquor license of relator. From an order denying the writ relator brings certiorari. Writ dismissed.

R. R. Stewart, for appellant.

KUHN, J. This is a certiorari proceeding by which it is sought to review the action of the circuit judge in denying the relator's prayer for a writ of mandamus to compel the respondents, who are the president and board of trustees of the village of Munising, to reconvene and approve his application filed October 1, 1914, and bond filed October 10, 1914, to engage in the retail liquor business for the remainder of the license year.

A meeting of the council was held on October 20, 1914, at which time the relator's application was rejected without any reason being given, and no action was taken with reference to the bond. It now appears, and is conceded by counsel for relator in his brief, that the period covered by the relator Carlson's application has passed, and that therefore no relief can now be granted him. This litigation, therefore, at this time presents simply abstract questions of law which do not rest upon existing facts or rights. This of necessity renders it a "moot case," which we will decline to determine.

The writ of certiorari having been improvidently issued, it will be dismissed, without costs.

BROOKE, C. J., and PERSON, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

PEOPLE *v.* EAGLE.

CRIMINAL LAW—EVIDENCE—LARCENY—HARMLESS ERROR.

Where a witness, in a prosecution for the larceny of a cow, had positively identified respondent as the man who sold him a cow answering the description of the one lost, evidence as to his conversation with the sheriff and the circumstances leading up to his identification of respondent by a photograph, was harmless error.

Error to Alpena; Emerick, J. Submitted October 28, 1915. (Docket No. 106.) Decided December 21, 1915.

George Eagle was convicted of larceny. Affirmed.

Grant Fellows, Attorney General, and *Carl R. Henry*, Prosecuting Attorney, for the people.

I. S. Canfield, for respondent.

KUHN, J. The respondent was placed on trial in September, 1913, under an information charging him with having, on the 29th of June of that year, committed the crime of larceny of one "Jersey colored milch cow, of the value of $50, of the property of Mary E. King." The jury were unable to agree upon a verdict and the court discharged them from further consideration of the case. He was again placed on trial in the following December term of the court for the same offense, and was then convicted by the verdict of the jury and sentenced to be confined in the State prison at Jackson for a period of not less than 2½ years and not more than 5 years from and including the 13th day of December, 1913. A review of the case is sought here by writ of error.

Digitized by Google

The assignments of error which counsel for respondent urges to reverse the case are grouped by him in his brief under three headings:

(1) Exclusion by the court of competent evidence in favor of the respondent.
(2) Admission by the court of incompetent evidence against the respondent.
(3) Prejudicial errors by the court in charging the jury.

The cow alleged to have been stolen was 11 or 12 years of age, and had been raised by Mrs. King, the owner, from a calf. Some 6 or 7 years before the trial the cow had been dehorned, and the horn on the right side was three or four inches long, while the horn on the left side was a mere stub. Upon the trial the people produced a skull, to which some hair was still attached, and two witnesses (Mrs. King, the owner, and William King, a neighbor) identified the skull as that of the lost cow by the peculiarities of the horns. Mrs. King further stated that she was able to identify it by "what little hair is left on there, and I can almost see the expression of the cow just in them bones, as she looked to me when alive."

A witness named Boilore, who was in the business of buying and selling cattle, was asked the following questions by respondent's counsel on cross-examination:

"*Q.* Could anybody tell anything about that particular skull belonging to any particular cow?
"*A.* Well, I couldn't.
"*Q.* Well, would you think so?
"*A.* I couldn't say.

The court thereupon ruled:

"I don't think that that testimony is competent, Mr. Canfield. A mere matter of opinion for the jury to say."

It is urged that this is error, and that he should have been allowed to testify. It seems to us clear, however,

Digitized by Google

that the witness had already said that he "could not say." There could not, therefore, have been any error in the court's ruling.

Error is also urged because of the refusal of the court to permit certain evidence on the cross-examination of the people's witness John Simmons, the sheriff, which was offered to show that the sheriff had associated with him a mind reader in his efforts to apprehend the offender. He was sworn to show where and how he located the skull, and further, to establish the custody of the skull from the time it was exhibited to the witnesses until the time it was produced in court. The court, with reference to this testimony, said:

"The people of this State, the prosecution in this case, have not placed any reliance on any mind readers, nor other readers, that I can see. Noboby is trying to tell fortunes or anything of that kind. They are just telling you—Mr. Simmons is telling you what he did. Of course, you would have a right to cross-examine, if you dispute the fact that he got the head up there. I don't see what this mind reader has got to do with the case myself. If he didn't get the head up there, that is all right. But he says it is where he got the head; and there has been some witnesses that expressed the opinion that this is the head of Mrs. King's cow. There are no mind readers in here, and I would like to keep them out, if I could, because it hasn't got a thing to do with this case."

We are of the opinion that no error was committed by the court in restricting the cross-examination of the witness in the way he did, and excluding testimony which was clearly incompetent and immaterial.

The witness Boilore testified that he purchased a cow answering the description of the cow Mrs. King claimed to have lost, and positively identified the respondent as the man from whom he purchased the cow. The witness had never seen the respondent before he purchased the cow from him, and the next occasion

Digitized by Google

of his seeing him was in the office of the prosecuting attorney, at which time, he testified, the following took place:

"I was setting in the office and Mr.——, our sheriff, come in and got talking about—about this case. I didn't know anything about it, and the sheriff put his hand in his pocket and give me a photograph. I looked at the photograph. I says: 'I bought a cow from this man.' I didn't know anything more about it than I did anything. So the sheriff says: 'Come on with me; I want you.' Took me out doors and fetched me over to the court. They asked me—Mr. Henry asked me if this was the man. 'Do you know the man?' I says: 'Yes; that is the man, right standing out doors there, standing right there.' I was fetched upstairs in court; never knew any more about it; put on the examination stand right away."

It is urged that this testimony was incompetent, irrelevant, and immaterial, and that its admissior was therefore error. We cannot agree with this contention of counsel, and think that it was entirely proper to show how and in what manner the respondent was identified by the witness as the person from whom he purchased the cow.

Other assignments urged relate largely to the charge of the court, and it is urged that the court, in referring to certain facts, gave undue prominence to the testimony of certain witnesses, and that parts of his charge were argumentative in nature. It is true that some parts of the charge taken by themselves might be subject to the criticism made of them by counsel. Nevertheless, taking the charge in its entirety, we are impressed that it carefully conserved the rights of the respondent and submitted the issue to the jury with the proper instructions.

After a careful examination of this record, we are not convinced that any prejudicial error was commit-

Digitized by Google

ted in the trial of this case, and therefore affirm the judgment of the court below.

BIRD and MOORE, JJ., concurred with KUHN, J.

BROOKE, C. J. We are of opinion that the admission of the testimony last quoted of the witness Boilore was harmless error, and we therefore concur in the result.

PERSON, STONE, OSTRANDER, and STEERE, JJ., concurred with BROOKE, C. J.

ST. JOSEPH'S CHURCH *v.* CITY OF DETROIT.

1. TAXATION—EXEMPTION—CHURCH PROPERTY.
   A lot owned by a city church and used as a tennis court for a part of the time after its purchase, being intended for a parsonage, which the plaintiff commenced to erect after the taxes for the year had been assessed and which was occupied by its rector in November of that year, was properly assessed, and could not be treated as exempt property until it was actually used for religious purposes. 1 Comp. Laws, § 3830, subd. 5, as amended by Act No. 174, Pub. Acts 1911.

2. SAME—DEFINITION.
   A parsonage may be defined as a house in which a minister of the gospel resides; it may be with land or without it.

3. SAME—ASSESSMENT—DETROIT CHARTER.
   Under the charter of the city of Detroit, property is required to be assessed before the first of April, and the taxes become an indebtedness of the owner from the time of listing the land for assessment. The taxes levied become a lien on the first of July.

4. SAME—STRICT CONSTRUCTION.
   It is a cardinal rule that exemption statutes, unlike homestead statutes, should receive a strict construction.

Digitized by Google

5. SAME.

A grant of exemption from taxation is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power and the burden is on the claimant to establish clearly his right to exemption.

Error to Wayne; Codd, J. Submitted October 27, 1915. (Docket No. 150.) Decided December 21, 1915. Rehearing denied June 23, 1916.

Assumpsit by St. Joseph's church against the city of Detroit to recover back taxes paid under protest. Judgment for plaintiff. Defendant brings error. Reversed; new trial denied.

Walter Barlow (*Harry J. Dingeman,* of counsel), for appellant.

John J. Gafill, for appellee.

STONE, J. This is an action in assumpsit to recover certain general city taxes assessed upon certain real estate of the plaintiff for the year 1913, and paid under protest by the plaintiff. There are no disputed facts in the case. They were agreed, by stipulation filed, to be as follows:

"Plaintiff is an Episcopal Church, organized under the laws of the State of Michigan, in the year A. D. 1887, for purposes of public worship, and has continuously conducted religious services from the date of its organization down to the present.

"That from and after its organization, religious services were conducted in the church building on the northeast corner of Medbury and Woodward avenues, and so continued until on or about, to wit, the year 1907. The property at the corner of Medbury and Woodward avenues was sold in 1907 and the money received for the equity in the property at the corner of Medbury and Woodward avenues was used to apply on the purchase of the following described property:

Digitized by Google

"Lot 1 of J. W. McLaughlin's subdivision of the westerly 1,492 feet of the northerly half of lot 4, and the westerly 1,492 feet of lot 5 of the subdivision of quarter section 44, 10,000-acre tract, in the city of Detroit, this lot having a frontage of 117.44 feet on Woodward avenue, and 200 feet deep on Holbrook avenue;

"Also lot two of J. W. McLaughlin's subdivision of the westerly 1,492 feet of the northerly half of lot 4 and the westerly 1,492 feet of lot 5 of the subdivision of quarter section 44, 10,000-acre tract, in the city of Detroit, Wayne county, Michigan, this property having a depth of 130 feet on Woodward avenue and 200 feet on King avenue.

"The above-described lots 1 and 2 are located on Woodward avenue, between Holbrook and King avenues, being adjoining lots and having a frontage of 247.44 feet on Woodward avenue, and having a depth of 200 feet on Holbrook and King avenues, as above set forth.

"That the church property at the corner of Medbury and Woodward avenues was never assessed or taxed, during the time it was used and occupied as a church, that is, from 1887 down to the date of sale, the same being treated as exempt under the law.

"That the property on Woodward avenue between Holbrook and King avenues was purchased in 1907. That this property was purchased exclusively for church purposes, and for constructing thereon church buildings, and the plan at the time of purchase was to utilize the property, by putting a large church building in the center of the property, facing Woodward avenue, and the parsonage on the King avenue side of the property, and the church house on the Holbrook avenue side, and sketches were made at the time of purchase of this general plan. On account of the expense involved in putting up the large building, the church built temporarily, a church house, for religious services on the Holbrook side of the property. This was done in 1907, and religious services have been conducted in this building down to the present time, this church building occupying lot 1 hereinbefore described. On or about the 1st day of April, 1912, the establishment of a tennis court was authorized by the

Digitized by Google

vestry, upon lot 2, and this tennis court was established for the benefit of the members of the church, and at the church expense. The tennis court is still in existence and maintained by the church and used by the church members.

"That on or about the 22d day of July, A. D. 1912, a resolution was passed authorizing the construction of the parsonage on lot 2, and the contract for the construction of the parsonage was let on or about, to wit, the 7th day of April, A. D. 1913, and the actual work begun on or about, to wit, April 10, 1913, and the rector moved into the parsonage on or about, to wit, November 15, 1913. None of the property above described was assessed or taxed from the time the church acquired same until 1912, when the assessing officers placed on the rolls lot No. 2 above described, and the tax was paid by the church in 1912. Lot 2 was again assessed for the year 1913. This tax the church refused to pay, and presented the matter to the board of review for cancellation, on the grounds that the property was exempt, as the construction of the parsonage had actually been started about, to wit, April 10, 1913. The board of review, however, declined to remove the assessment. Later the matter was presented by petition to the common council for cancellation, which petition was denied, and the following resolution passed by the common council February 16, 1915, to wit,

"'To the Honorable the Common Council—

"'*Gentlemen:*

"'Your committee on taxes, to whom was referred the petition of the St. Joseph's Episcopal Church, asking for the cancellation of the taxes on lot 2, Joseph R. McLaughlin's subdivision of the w'ly 1,492.92 ft. of the N. ½ of lot 4 and the w'ly 1,492.92 ft. of lot 5 of the sub. of ¼ sec. 44, 10,000-acre tract, for the year 1913, respectfully report that we find this property was purchased by the society prior to the year 1908, and that the building of a parsonage thereon was done in 1913, the property was prematurely exempted from taxation for the years 1908, 1909, 1910, 1911, and 1912. The assessors, finding it still vacant in 1913, placed it on the rolls, but, in 1914, finding that a parsonage had been built, and was at that time occupied, exempted the property from further taxation.

"'Your committee have, for many years, taken the position

Digitized by Google

that under the laws of the State of Michigan, which exempts from taxation such properties as are owned and occupied by religious societies for religious purposes, that such exemption applies only to such properties, after the building is occupied and used for religious services therein, or as a parsonage.

" 'The St. Joseph's Church, due to the premature exemption mentioned, has already received a benefit of five years' exemption from taxation on this lot, to which, in our opinion, they were not really entitled. Your committee, however, owing to the existing misunderstanding, as this tax for the year 1913 having been levied, recommend that the society be permitted to pay the taxes due for that year, without the penalty and interest charges, and we herewith submit the proper resolution and recommend its adoption. [Signed by Committee.]' "

Thereupon a resolution of the common council was unanimously adopted, directing the city treasurer to accept the actual amount of the tax, canceling all penalty and interest charges thereon, provided the same should be paid within 30 days from the adoption of the resolution. Thereafter, and on April 6, 1915, the full tax, with penalty and interest, was paid by plaintiff, under protest, claiming that the property was exempt from taxation, under the statute.

Upon the foregoing statement of facts, and the pleadings, each party moved the trial court for a directed verdict in its favor. The court directed the jury to return a verdict for the plaintiff, for the full amount claimed, which was done, and a judgment was entered thereon. The defendant has brought error. The only errors assigned are, to the refusal to direct a verdict for the defendant, and the direction of a verdict for the plaintiff. The only question presented by the record is whether said lot 2 was properly assessed for general city taxes for the year 1913.

The taxation, or exemption from taxation, of said lot 2 for said year, depends on the construction to be placed upon section 3830, subd. 5, 1 Comp. Laws, as amended by Act No. 174, Pub. Acts 1911, which reads as follows:

Digitized by Google

"The following real property shall be exempt from taxation: * * *

"5. All houses of public worship with the land on which they stand, the furniture therein and all rights in the pews, and also any parsonage owned by any religious society of this State and occupied as such."

A parsonage may be defined as a house in which a minister of the gospel resides. In its ecclesiastical sense the word was "glebe (or land) and house" belonging to a parish appropriated to the maintenance of the incumbent, or settled pastor of a church; but its modern general signification is in the sense of its being the residence of a parson, and it may be with land or without it. 29 Cyc. p. 1693; *Wells Estate* v. *Church,* 63 Vt. 116 (21 Atl. 270).

It will be borne in mind that the contract for the construction of the parsonage in the instant case was let on or about April 7, 1913, and the actual work begun on or about April 10, 1913, and the rector moved into the parsonage on or about November 15, 1913.

We agree with the claim of appellant that the dominant feature of the statute is that such parsonage must first be occupied as a parsonage, before it can be held to be exempt from taxation. In other words, it is an essential requirement of the statute that the parsonage must be occupied as such before it can be legally exempted from taxation. Whether, after such occupancy, a mere temporary vacancy would render it subject to taxation, we need not decide.

The Detroit city charter requires that:

"The board of assessors shall before the first day of April in each fiscal year, assess at its true cash value all the real and personal property subject to taxation by the laws of this State, within the limits of each ward, respectively, of said city."

Also that:

"All city taxes shall become a debt against the

Digitized by Google

owner from the time of the listing of property for assessment by the board of assessors, and shall become due and payable forthwith upon the receipt of the tax roll by the receiver of taxes."

As we understand the charter, the assessment becomes conclusive April 1st, unless it is modified by the board of review. *City of Detroit* v. *Patten,* 143 Mich. 243 (106 N. W. 884). And the taxes levied become a lien on the real estate assessed on July 1st, when the tax rolls go into the hands of the city treasurer for collection. *Eaton* v. *Chesebrough,* 82 Mich. 214 (46 N. W. 365); *Jacobs* v. *Trust Co.,* 155 Mich. 233, 235 (118 N. W. 921); *Crawford* v. *Koch,* 169 Mich. 372, 380 (135 N. W. 339).

It is a cardinal rule that exemption statutes—unlike homestead statutes—should receive a strict construction. Cooley on Taxation (2d Ed.), p. 205. Statutes providing for exemption from taxation must be understood as exempting only as therein specified.

A grant of exemption is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption. See 37 Cyc. pp. 891, 892, and cases cited, including *East Saginaw Manfg. Co.* v. *City of East Saginaw,* 19 Mich. 259 (2 Am. Rep. 82); *Attorney General* v. *Common Council,* 113 Mich. 388 (71 N. W. 632). We have accordingly held that only such lands of a railroad company as are held and presently used for railroad purposes are exempt from taxation on the general roll; the exemption not applying to lands acquired by the company, with a view to future use. *Auditor General* v. *Railroad Co.,* 119 Mich. 682 (78 N. W. 889); *Auditor General* v. *Railroad Co.,* 114 Mich. 682 (72 N. W. 992).

Digitized by Google

The statute there under consideration provided that the specific taxes on a railroad company should be in lieu of all other taxes, except such land as was "not actually occupied in the exercise of its franchise, and not necessary, or in use in the proper operation of the road." A careful examination of the statute, and the authorities cited, lead us to the conclusion that the lot involved in the instant case was legally taxed for the year 1913.

The judgment of the circuit court is therefore reversed, and no new trial will be granted.

BROOKE, C. J., and PERSON, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PEOPLE *v.* PLUMMER.

1. CRIMINAL LAW—INTOXICATING LIQUORS — EVIDENCE — ILLEGAL SALES—OTHER OFFENSES.

In a prosecution for the unlawful sale of beer in a local option county, testimony that another party present purchased and paid for beer on the same occasion was admissible to refute the contention that the act was merely one of a hospitable nature, and to impeach respondent who testified to the defense alleged.

2. SAME—WITNESSES—REQUIRING PROSECUTION TO PRODUCE.

The trial court did not commit error in refusing to compel the people to indorse as a witness, on the information, the name of one who lived with respondent and upon whom marked money was found that the police had procured to be used in the buying of beer, and who was not, in fact, present when the liquor was furnished; the record also showing that the respondent had objected to the tes-

Digitized by Google

timony relating to the finding of the marked money, and that the court had struck it out, later, on respondent's motion, restoring the proof to form the basis of the motion to indorse the additional name on the information. The subject was a matter that rested in the discretion of the court.

3. SAME—WITNESSES.

An agent of the police, employed to secure, not evidence of a crime committed, but evidence of a crime to be committed by the procurement of the agent, is not a person whose testimony upon the subject of the crime is generally received, in or out of court, without close scrutiny; but it is not the right of a respondent to have the jury instructed to regard his testimony favorably or unfavorably.

Exceptions from Ingham; Wiest, J. Submitted October 28, 1915. (Docket No. 108.) Decided December 21, 1915.

Rosetta Plummer was convicted of unlawfully selling intoxicating liquor in a county in which prohibition was in force. Affirmed.

Grant Fellows, Attorney General, and *William C. Brown*, Prosecuting Attorney, for the people.

Warner, Raudabaugh & Person, for the respondent.

Respondent is charged with having sold and furnished beer to one Charles Hill, she not being a pharmacist, the sale being made in Ingham county, in which county selling and furnishing liquor was forbidden, pursuant to the provisions of Act No. 207, Pub. Acts 1889, as amended. The testimony for the people tended to prove the sale of beer as alleged and the payment for the same in marked money, afterwards recovered, but not from respondent. The witness Charles Hill was an agent of the police of the city of Lansing for the special purpose of trying to purchase liquor of respondent upon the particular occasion. By an arrangement members of the police force visited

Digitized by Google

respondent's residence at or about midnight, found evidences of the drinking of beer, arrested all inmates of the house, and took them and some beer found on the premises to police headquarters.

The people produced as a witness Arthur Rossman, one of the men found at respondent's house upon the occasion in question, and without objection he gave testimony to the effect that upon the same evening he had beer served him by respondent and paid her 50 cents for two pint bottles of beer.

The marked money which the witness Hill claimed to have paid to respondent for the beer he purchased was found by the police at the police station in the possession of Charles Garver. The name of Garver was not indorsed upon the information, and he was not produced by the people as a witness. The court refused to require the people to indorse the name or produce him as a witness.

The testimony being concluded, respondent moved to strike out the testimony of Arthur Rossman as incompetent, irrelevant, and immaterial, the point which was made being that it tended to prove an offense other than the one which respondent is charged with having committed, for which purpose it was not admissible. The motion was denied. Respondent admitted having furnished beer to Hill and his companion Cook, but as an act of hospitality to guests. She denied having accepted any money for it; denied knowledge of any sale or furnishing of beer to Rossman; testified that the beer belonged in any event to a man rooming at her house, to whom it appears to have been consigned. The court left to the jury the question whether respondent sold or furnished the beer as charged, or furnished it as an act of hospitality, saying:

"One may in his own home, as an act of hospitality

Digitized by Google

in good faith, and not as a subterfuge, but an act of entertainment and kindness, give a visitor intoxicating liquors, and not be guilty of a violation of the local option law."

And the jury was instructed that, if they entertained a reasonable doubt upon the question of her good faith, she was entitled to the benefit of the doubt. As to the testimony of Rossman the jury was instructed that respondent was not charged with having furnished him nor any one but Hill with liquor, but that, if they found that during the evening she furnished liquor to others, they might consider the fact as affecting her motive and purpose in furnishing liquor to Hill. As to the witness Hill the court said to the jury, in substance, that he went to respondent's house to induce her to violate the law, to be a party to such violation of the law, and in considering his testimony they should consider what he undertook to do as bearing upon the credit which should be given him, and should bear in mind that his services had been enlisted for the purpose of securing evidence against the respondent; that the credit to be given to his testimony was for them to determine.

The exceptions urged in this court are:

(1) To the ruling refusing to strike out the testimony of Rossman.
(2) To the charge as relating to his testimony.
(3) To the ruling respecting the indorsement of Garver's name on the information and to calling him as a witness for the people.
(4) Refusal to give the substance of respondent's third and fourth requests to charge, which relate to the favor or disfavor with which the testimony of Hill should be viewed.

OSTRANDER, J. (*after stating the facts*). None of the exceptions can be sustained. In view of the positive testimony of sales of liquor to Hill and his companion, the admission that liquor was furnished to

Digitized by Google

them, and the claim that it was a mere act of hospitality, it was material and pertinent to consider the testimony that during the same evening respondent furnished liquor to another male acquaintance and received pay for it, as affecting the credit to be given to her testimony. *People* v. *Giddings*, 159 Mich. 523 (124 N. W. 546, 18 Am. & Eng. Ann. Cas. 844); *People* v. *Hancock*, 166 Mich. 654 (132 N. W. 443).

It is not contended that Garver was present when the alleged furnishing of liquor occurred. He was a boarder, or roomer, in the house, and was taken, with all the others, by the police. The testimony of a police officer is that the marked bills which Hill testifies he paid to respondent for liquor were found in Garver's possession. How he got them does not appear. It is said in argument that, having laid a trap for respondent, the plan including the use of marked money to be found in her possession, the people should in fairness account for this failure of the plan; that in laying the plan the police themselves determined the *res gestæ*, and the people have not developed the *res gestæ*. But it is plain that Garver was not a necessary witness in making out the case for the people. The case alleged in the information was a particular sale and furnishing of liquor, of which the witness Garver personally had no knowledge. But beyond this it appears that Garver was an inmate of respondent's home; that he completed dressing himself in respondent's room when ordered to accompany the police to headquarters. It is also to be considered that upon the application of respondent the court struck out the testimony relating to the finding of the money with Garver, and later, on motion of respondent, restored the testimony, when it was made the basis of the motion to produce him as a witness. Considered as a matter resting within the sound discretion of the trial court, discretion was not abused by the ruling.

Digitized by Google

The requests to charge which have been referred to, if they had been given as preferred, would have more pointedly directed attention to the testimony of the witness Hill, and included the advice that the jury regard his testimony with disfavor. In *People* v. *Everts*, 112 Mich. 194 (70 N. W. 430), the trial court instructed the jury substantially as requested by respondent in the case at bar. It was said the charge was as favorable as respondent was justified in asking.

In the administration of the law the courts usually take notice of matters of which every one takes notice. An agent of the police, employed to secure, not evidence of a crime committed, but evidence of a crime to be committed by the connivance and procurement of the agent, is not a person whose testimony upon the subject of the crime is generally received, in or out of court, without close scrutiny. Given upon the trial of the cause, its weight and the credit to be given to him are for the jury. *People* v. *Rice*, 103 Mich. 350, 353, 354 (61 N. W. 540). It is proper, indeed, it may be the duty of the court, to direct the attention of the jury to the witness and testimony. It is not the right of the respondent to have the jury advised to regard the testimony of such a witness favorably or unfavorably.

The exceptions are overruled, and the court advised to proceed to judgment.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

SHEVCHENKO *v.* DETROIT UNITED RAILWAY.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION — JURISDICTION TO MAKE AWARD.

   Claimant was injured while he was employed by the defendant as a common laborer and made application for an award under the workmen's compensation act. The injury took place before the employer had filed its notice of intention to take the benefit of the statute. *Held*, that the filing of such notice was essential to the jurisdiction of the accident board, and unless the employer consented to the proceedings they were invalid.

2. SAME—NOTICE—INDUSTRIAL ACCIDENT BOARD.

   No right to recover for personal injuries that may have occurred before the filing of the statutory application and its approval by the accident board existed without the employer's consent.

3. SAME—CONSENT.

   The fact that the employer did not object formally to the jurisdiction of the Industrial Accident Board until the entry of the decree did not warrant the granting of an award, when it was made to appear that the point was brought up and discussed at the close of claimant's testimony before the board and was raised before the arbitration committee.

Certiorari to the Industrial Accident Board. Submitted October 27, 1915. (Docket No. 157.) Decided December 21, 1915.

Jacob Shevchenko presented his claim for an award under the workmen's compensation act. From the award made, the Detroit United Railway brings certiorari. Reversed.

Digitized by Google

Corliss, Leete & Moody and *Benjamin S. Pagel*, for appellant.

Rosenberg, Cornelius & Ring, for appellee.

Claimant was a common laborer, employed by the respondent railway company, and claims he was injured October 7, 1912, in the course of his employment. As appears by the affidavit for the writ of certiorari and the return to the writ, on November 17, 1914, he filed with the Industrial Accident Board an application for adjustment of claim for the injuries he had received, in which he stated that his injury was received October 7, 1912. A copy of the application was served on respondent, with notice from the board to appoint an arbitrator. Respondent appointed an arbitrator, claimant appointed one, and these, with a member of the board, constituted a committee which met December 22, 1914. Claimant and respondent were represented by counsel. Testimony was introduced by claimant, and was concluded. None was introduced for respondent. A colloquy ensued, in the course of which the chairman inquired of counsel for respondent:

"Does the Detroit United Railway claim that they were not under the act at the time?"

—and counsel replied:

"As I understand it, I have been told that they were not. I can say positively that we were not at the time."

The chairman said:

"Well, if that question was brought up, I want time to investigate it.

"*Mr. Pagel:* Of course, if we are under the act, it is a different situation.

"*Chairman Gloster:* I would like to make the suggestion that if you will both present your cases complete, we will postpone this argument until some other day, or until this matter is looked up. * * *"

Digitized by Google

An adjournment for two days was taken, and on the adjourned day, as appears by the return, no further proofs were offered, and an award was made in favor of claimant. It is further certified in the return that respondent—

"elected to come under the terms of the workmen's compensation law on the 23d day of December, 1912, of which election this board was duly notified by letter of respondent of the same date, and that upon the 27th day of December, 1912, this board notified the said respondent * * * of the acceptance by the said board of the offer of the said respondent. * * *"

Respondent claimed a review upon the ground that the proofs produced at the arbitration hearing conclusively show that respondent had not accepted and come under the terms of the aforesaid act at the time of the alleged injury to claimant. A review was had, and the award was affirmed. An opinion of the board is returned, to the effect that the sole ground of "appeal" is as above stated, and that:

"In the correspondence before the case was set for arbitration, respondent treated it as an accident occurring while the company was under the compensation law. At the arbitration respondent appeared and defended on the merits, going through to the end of the hearing without raising the question, and then it was only raised in colloquy between the attorneys and the chairman of the committee on arbitration; no proof whatever being offered. The arbitration was held in the city of Detroit, and the records of the board, relating to the acceptance of the act by respondent, were at the offices of the board in the city of Lansing. There was no proof offered tending to show that the respondent was not under the act at the date of the accident, and respondent, having treated it as a compensation case, selected its arbitrator, and gone through the entire hearing without raising the question, was held to have waived the point."

It is stated in the petition for the writ of certiorari

Digitized by Google

that a copy of the letter of respondent to the board and the original letter of acceptance, dated December 27, 1912, were presented to the committee on arbitration; that the Industrial Accident Board erred in finding that respondent did not offer such proof and in holding that respondent had waived its right to raise the question by appointing an arbitrator.

OSTRANDER, J. (*after stating the facts*). The necessity for a construction of the provisions of Act No. 10, Extra Session 1912, which will enable both employer and employee to know when the act does and when it does not apply, was illustrated in *Bernard* v. *Traction Co.*, 188 Mich 504 (154 N. W. 565), and is again illustrated in this proceeding. In that case, the injury complained about was received at a date intervening the notice by the employer of election to be bound by the act and the date of the approval of the application by the board. The employer, presenting the facts, urged them as a defense to an action at law brought by the injured employee. It urged, further, and proved, that the plaintiff had given a notice to the board of a claim under the act. We held that the trial court was right in rejecting the defense. In doing so, we said:

"We are satisfied that if a new status was created between these parties, it must be by virtue of the terms of the statute."

It is clear that the relations existing between respondent and claimant when the injury was received were not affected by the workmen's compensation act, a fact which was known to the Industrial Accident Board when its final order was made. Jurisdiction to make the order was then challenged, and was challenged before the arbitration committee. Being disputed, it is plain that jurisdiction was not admitted, and was therefore a thing to be in some way made to

Digitized by Google

appear before the board could make an award. The board possesses special and limited powers, defined in the act creating it. These powers it exceeded in making, or affirming, the award in question. Therefore the award must be, and it is, set aside.

BROOKE, C. J., and PERSON, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

SHAW v. HEHL.

1. CORPORATIONS—OFFICERS AND DIRECTORS—DEEDS—TRUST RELATIONS—GOOD FAITH.

A transfer of all the assets of a building and loan association to the secretary, director, and majority stockholder, by a resolution of the board of directors, which met on notice that was not duly mailed to the proper address of one director, who had been selected without his knowledge to act on the board, and which consisted of this director, a brother of the secretary and defendant secretary, was void, because of the trust relations existing between defendant and the association, although there was a previous deed executed to the secretary and a third party, the latter conveying to the defendant, and though the pretext for the deeds was to secure defendant from liability on certain mortgage indebtedness of the corporation for which defendant was personally liable.

2. SAME—MORTGAGES—RATIFICATION.

Held, also, that an earlier deed, which defendant did not appear to have relied on, did not preclude the association from questioning the validity of the subsequent transfer.

Digitized by Google

Appeal from Wayne; Codd, J. Submitted October 21, 1915. (Docket No. 3.) Decided December 21, 1915.

Bill by James A. Shaw, as trustee of St. John's Court, No. 949, and others, against John P. Hehl and others for an accounting and reconveyance of certain lands. From a decree for complainants, defendant Hehl appeals. Affirmed.

Felix A. Doetsch, for complainants.

Watson, Safford & Shepherd, for defendant Hehl.

MOORE, J. This is a bill filed under sections 9757 and 9759, 3 Comp. Laws, by the complainants as stockholders of St. Johns Building Association, for the purpose of setting aside a transfer to John P. Hehl of certain real estate and for an accounting of rents and profits. St. Johns Building Association was organized under Act No. 232, Pub. Acts 1903, in October, 1903. In December, 1903, this association purchased lots 1, 2, 3, 4, and 5 of William C. Maybury's subdivision of lot 10, etc., in Detroit, for the sum of $2,000, and erected a building thereon at a cost of about $6,600. In November, 1904, this property was deeded in the name of the St. Johns Building Association to William I. Wallace, and John P. Hehl as individuals. The ostensible purpose for which this deed was given was to raise money by mortgage to carry on the building operations, it being claimed that the money could be more readily borrowed if the title were in the individuals instead of in the corporation. On the same date, the said William I. Wallace and Elizabeth Wallace, his wife, deeded an undivided one-half interest in said premises to John P. Hehl, which deed was not recorded until October 9, 1908. Certain mortgages were given, and defendant claims he became personally liable

Digitized by Google

thereon. On December 17, 1909, a warranty deed was placed on record in the office of the register of deeds for Wayne county, which purports to have been executed July 21, 1909, by the St. Johns Building Association, through Louis Hehl (brother of John P. Hehl), as president and John P. Hehl as secretary, to the said John P. Hehl individually, and purporting to convey lots 1 to 5, inclusive. It is claimed by the complainants that these deeds to John P. Hehl were frauds on the building association, and the bill of complaint is filed to have them so declared, and for an accounting; the bill closing with a prayer for general relief. After a full hearing a decree was entered reading in part as follows:

"(*a*) That the deed of July 21, 1909, recorded in Liber 730 of Deeds, on Page 363, Wayne county register of deeds office, and purporting to convey from St. Johns Building Association as grantor, to John P. Hehl, said defendant, as grantee, the premises described in the bill of complaint herein, namely, lots 1, 2, 3, 4, and 5, of Wm. C. Maybury's subdivision, * * * be, and the same is hereby set aside, vacated, and declared null and void.

"(*b*) That the said John P. Hehl be, and he is hereby declared to be, and to have been trustee for the said St. Johns Building Association as to said premises, from and after November 21, 1904.

"(*c*) That as such trustee he shall account to said association as to all his dealings with said premises, and shall account for his official conduct in the management and disposition of the funds and property committed to his charge as a director and officer of said association.

"(*d*) That the said John P. Hehl and Susie Grace Hehl, defendants herein, be directed to reconvey, by good and sufficient deed, to said St. Johns Building Association, that portion of said above-described premises known as lot 5 thereof, and that, in default of such reconveyance, this decree stand in lieu thereof.

"(*e*) That in accordance with the stipulation between counsel in open court on the hearing of this

Digitized by Google

cause, said lot 5 be and remain subject to the several mortgages given by said John P. Hehl and Susie Grace Hehl, his wife, on or about December 11, 1909, to the Michigan Commercial Insurance Company of Lansing, Mich., and to Clarence K. Peck, respectively, which mortgages hold priority in the order named, the principal of said mortgage to said Michigan Commercial Insurance Company having been heretofore reduced to the sum of $3,100, and the said mortgage to said Peck being in the sum of $500.

"(*f*) That the title to the portion of said above-described premises, known as lots 1, 2, 3, and 4, heretofore on, to wit, October 27, 1911, conveyed by said John P. Hehl and Susie Grace Hehl to the defendant Geo. C. Hoffman, be declared to be in, and confirmed to, said George C. Hoffman, free of any claims on the part of said association, and of the lien of said mortgages, the said Geo. C. Hoffman having paid for said premises to said John P. Hehl as trustee for said St. Johns Building Association the sum of $3,000. That said St. Johns Building Association execute by its proper officers any necessary deed or reconveyance to quiet the title in said Geo. C. Hoffman, or that, in default thereof, this decree stand as such conveyance."

The decree further provided for a reference to a commissioner for an accounting. A hearing was had before the commissioner. Upon the coming in of his report a decree was made finding there was due to the receiver, who had been appointed during the proceeding, from the defendant, the sum of $1,131.15. An appeal is taken to this court from both of these decrees.

It was the claim of the defendant that the affairs of the association were in a bad way financially, that he was liable for any deficiency upon the foreclosure of the mortgages, that foreclosure was threatened, that no one else would take the property and pay the debts, and that he acted in good faith in taking the deed. We quote from the brief of counsel for the appellant:

"We desire to take up certain points discussed by

Digitized by Google

counsel for complainants, with which we cannot agree, and point out that, although John P. Hehl may have been ill advised and failed to comply strictly with certain technicalities, he has, throughout his course of dealings with the St. Johns Building Association, maintained clean hands and been guiltless of actual fraud on its members.

"(1) The notices of the special meetings of the stockholders of the St. Johns Building Association were sent to all of the stockholders.

"(2) A meeting of the stockholders was not necessary, as the power lay in the directors to sell this property.

"(3) Director John S. Bourke was notified to be present at the meeting of the board of directors held January 9, 1909.

"(4) Defendant Hehl, although he was a director, had a right to deal with the corporation.

"(5) There was a consideration for the sale of this property from the St. Johns Building Association to John P. Hehl.

"(6) John P. Hehl, in the course of his transactions with the association, kept well within the rules of fair dealing and was not guilty of fraud."

Because of the relations of defendant to the association, something more than good faith was required. He should have acted within the law.

Following the grouping of counsel, we think it necessary to refer only to groups 3 and 4. Counsel cite, in support of group 4, *Ten Eyck* v. *Railroad Co.*, 74 Mich. 226 (41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633); *Campau* v. *Driving Club*, 135 Mich. 575 (98 N. W. 267); and *Webster* v. *Canning Co.*, 149 Mich. 489 (113 N. W. 7). A reference to these cases will show they are not controlling.

The instant case may be disposed of upon the testimony of defendant alone. His testimony shows that he owned 60 per cent of the stock; that he caused to be elected as directors his brother, himself, and John S. Bourke; the last named had lived at Joseph Campau

Digitized by Google

street in Detroit, but moved to Logansport, Ind., and was never notified of his election as director.

The defendant's testimony also shows that notice of the directors' meeting at which the conveyance to defendant was authorized was given to Mr. Bourke by mail addressed to him at Joseph Campau street, Detroit, when defendant knew he had moved to Logansport, Ind., and that Mr. Bourke did not attend the meeting. There were present, according to the testimony of defendant, only himself and his brother, and, following a resolution that was then adopted, a deed was made to defendant which alienated all of the assets of the building association of which his brother was president and he was secretary.

Our attention has not been called to any authority which would sustain such a transaction. See *Miner* v. *Ice Co.*, 93 Mich. 97 (53 N. W. 218, 17 L. R. A. 412); *German Corporation* v. *Aid Society*, 172 Mich. 650 (138 N. W. 343); *Ervin* v. *Railway & Navigation Co.* (C. C.), 27 Fed. 625, and the many cases cited therein.

Counsel say the decree cannot be sustained because of the deed of November 21, 1904. We think it sufficient to say that the bill of complaint set out fully the relations of defendant with the association, the reason for the giving of the deed, the secret conveyance from Mr. Wallace and his wife to defendant, closing with a prayer for general relief. The record also shows defendant was claiming title, not by virtue of the deed of earlier date, but by reason of having the deed of July 21, 1909.

The decree is affirmed, with costs.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

Digitized by Google

HYDREX SILENT EXHAUST WORKS *v.* SEAGER ENGINE WORKS.

1. NEW TRIAL—MOTIONS—NEWLY DISCOVERED EVIDENCE.
   On motion for a new trial on the ground of newly discovered evidence to the effect that articles sold by the plaintiff were not specially made, the fact that defendant had over eight months in which it might have discovered the evidence, and that it was cumulative in its nature, furnished sufficient reason for denying the new trial.[1]

2. SAME—EVIDENCE—MATERIALITY.
   Unless the evidence is material and likely to change the result it is not sufficient ground for a new trial.

3. APPEAL AND ERROR—REQUESTS—SAVING QUESTIONS FOR REVIEW—TRIAL.
   On error to review a judgment at law, the appellant is not entitled to reverse the judgment for failure to charge the jury, if no requests for instructions were filed.

4. SALES—ACTIONS—DAMAGES—RIGHTS OF SELLER.
   The seller of specially manufactured articles that have been refused by the purchaser has the remedy of retaining the property in the event of their destruction and suing for the entire purchase price, or he may sell the goods and apply the proceeds on account, or keep them and bring an action for the loss sustained.[2]

5. COMPROMISE AND SETTLEMENT—EVIDENCE—COLLATERAL ISSUE.
   Where plaintiff agreed to furnish silencers to be fitted to engines which defendant manufactured for a corporation that had common stockholders and officers with the plaintiff, and defendant claimed, in an action for breach of its agreement to receive the silencers, that plaintiff had compromised its claim with the purchaser of the engines, the court did not err in rejecting evidence of the alleged settlement, since it would tend to raise a collateral issue.

---

[1]Cumulative evidence as basis for new trial is discussed in note in 14 L. R. A. 609.

[2]On measure of damages for purchaser's refusal to accept goods specially manufactured for him, see notes in 4 L. R. A. (N. S.) 740, 18 L. R. A. (N. S.) 613.

Digitized by Google

Error to Ingham; Wiest, J. Submitted October 21, 1915. (Docket No. 129.) Decided December 21, 1915.

Assumpsit by the Hydrex Silent Exhaust Works against the Seager Engine Works for breach of a contract of purchase. Judgment for plaintiff. Defendant brings error. Affirmed.

Clark C. Wood, for appellant.

Irvin Long (*C. F. & E. T. Hammond,* of counsel), for appellee.

MOORE, J. The trial judge charged the jury in part as follows:

"The plaintiff, the Hydrex Silent Exhaust Works, a corporation, and manufacturers of the Hydrex silent exhaust silencer, claims that the defendant, the Seager Engine Works, a corporation, was employed to manufacture certain gasoline engines for the Lackawanna Manufacturing Company to be equipped with the Hydrex engine exhaust silencer, and to obtain the silencer their plant agreed with plaintiff upon terms of purchase, and gave plaintiff orders for 275 silencers to be specially made; that they manufactured the silencers ordered, and delivered 146 of them to defendant, for which the defendant has paid, and had the remainder for delivery and offered delivery of them to defendant, and defendant refused to take them; that, being a special make, the silencers were held in plaintiff's storeroom subject to defendant's order until the storeroom burned in January, 1914, when they were destroyed by fire.

"This suit was brought to recover the value of the silencers ordered by defendant and manufactured on such orders by plaintiff and refused to be taken and paid for by defendant. Defendant denies that it ever entered into contract with plaintiff, and denies that it ever gave orders of purchase of the silencers. It admits making a contract with the Lackawanna Manufacturing Company under which it was to manufacture gasoline engines for the Lackawanna Manufacturing Company to be equipped with silencers; that it was

Digitized by Google

agreed with Mr. Hall, who made the contract for the Lackawanna Manufacturing Company, and also was president and general manager of both the Lackawanna Company and the plaintiff company, that it would be absurd for the plaintiff company to sell silencers to defendant to go with the gasoline engines made for the Lackawanna Company, because, if that was done, a charge of 10 per cent. would have to be added merely for their passing through this shop, and because of the relations between the plaintiff company and the Lackawanna Company the silencers should be furnished to the Lackawanna Company by the plaintiff, and not by the plaintiff to defendant. Defendant also claims that the orders given by its purchasing agent to plaintiff for silencers were not purchasing orders, but were memorandum under the agreement with Mr. Hall that the plaintiff might know what silencers it furnished the Lackawanna Company through the defendant. * * *

"Plaintiff, in order to recover, must satisfy you by a preponderance of the evidence that there was a contract of sale of the silencers to defendant. A contract of sale, to be valid, must designate the kind of articles, the subject of the sale and the price to be paid; and such a contract may be partly in writing and partly verbal, provided it has been performed in part after its making. So in this case the parties were at liberty to contract for the silencers, and to agree verbally upon the price to be paid for the same. And if you find that with an agreement as to the price of the silencers to be paid for on orders given for the same defendant gave written orders for specified silencers, and such orders were accepted by plaintiff and performed in part by delivery of some of the silencers, then there was a valid contract, and, if plaintiff made the silencers under such a contract, then defendant was under obligation to take and pay for the same when offered delivery of what it had ordered. * * *

"You are to have in mind that, in order to make a contract binding between parties, the minds of the parties must have met upon the subject-matter of the contract. One may not be held to have made a contract unless it was his intention to make a contract. That intention is to be gathered from the writings entered

Digitized by Google

into, providing the writing covers the matter. In case the writing does not cover all of the claimed contract, and a part of it is claimed to have rested in mere words passing between the parties, then the jury should take into consideration, not only the writing, but all the evidence disclosed relating to the intention and understanding of the parties upon the question of contract or no contract. * * *

"Was there a contract made between these parties? Was it understood and agreed between the defendant company and the plaintiff company that the silencers to be used upon the Lackawanna gasoline engine should be the silencer manufactured by the plaintiff company, and that this silencer should be sold and charged to the defendant company? * * *

"Was there a contract under which plaintiff was to manufacture for defendant at agreed prices special designs of silencer, and under which defendant was to accept and pay for the same, or was the manufacture of silencers for the Lackawanna Manufacturing Company, and not for defendant, and the dealings between plaintiff and defendant relative to the silencers less than contract relations for the sale by plaintiff to defendant and purchase by defendant from plaintiff of the silencers in question? * * *

"Was it the intention of these parties, the one in giving the order, and the other in making the silencer, that there was a contract binding upon the defendant to buy and take, and upon the plaintiff to make and to sell, the silencer in question? If any order was given as a purchase and accepted by the plaintiff, and the goods made and some of them delivered, and the rest of them ready for delivery and tender of delivery made, then there was a good contract. If the order was given, on the other hand, under an arrangement that it should operate merely as a memoranda, so that it might be known afterwards, in case of inquiry, what silencers, if any, were furnished to go with the Lackawanna Company engine through the shop of the defendant, and without a contract that such silencer should be paid for by the defendant company, then there was no contract upon the giving of these orders. I mean by that this: These orders may be explained. The defendant is at liberty to come in here and ex-

Digitized by Google

plain the circumstances under which they were given so far as such circumstances were known to the plaintiff. The defendant claims that the orders were given after an agreement between the defendant company and the plaintiff company that the silencers should be furnished, not to defendant company, but to the Lackawanna Company. * * *

"If the silencers were made to order, then, when completed and tendered defendant, in case they were tendered, and in case you find there was a valid contract, then they became the property of the defendant, and plaintiff might store them subject to defendant's order, and in case of their destruction by fire the loss was that of defendant, and does not excuse defendant from paying for the same.

"Now, it is the claim of the plaintiff in this case that this was an order for a specially made silencer, and because of its special make upon the order of the defendant it completed them and tendered them to the defendant company, and upon its refusal to take them, the title having passed, it held them as the property of the defendant company and subject to defendant's order; that in January, 1914, while they were being stored subject to defendant's order, they were destroyed by fire. If they were made upon the special order, a special design of silencers, if there was a valid contract between the parties, then it was the duty of the defendant to take them when completed and ready for delivery and, if it refused, and after that they were destroyed by fire, the loss must fall upon the defendant. * * *

"The item I have just given, being the amount claimed by the plaintiff, is $439.75. The defendant claims it does not owe the plaintiff anything, and that the payments made upon the silencers delivered were not intended as a recognition of an obligation; and the defendant has explained the circumstances under which he claims such payments were made.

"If you find for the plaintiff, then you will determine the amount due the plaintiff, and award the plaintiff the interest at the rate of 5 per cent. per annum from the 20th day of May, 1912. In case you cannot find from the evidence and by a preponderance of it that there was a contract made as claimed by the plaintiff, then your verdict will be that of no cause of action."

Digitized by Google

A verdict was rendered for plaintiff, and judgment entered thereon. Later a motion was made for a new trial. The judge overruled that motion, giving his reasons in writing for doing so. The case is brought here by writ of error.

Counsel for appellant say the questions involved are:

(1) Was the verdict of the jury supported by the weight of testimony?
(2) Should the motion of a new trial have been granted on the ground of newly discovered evidence?
(3) Did the court err in his charge to the jury relative to the special design of the silencers?
(4) Did the court err in submitting the question of an oral agreement as to price and design of silencers to the jury?
(5) Did the court err in refusing to admit evidence as to the terms of settlement between the Lackawanna Manufacturing Company and the defendant and in excluding the Defendant's Exhibit 6?
(6) Did the court err in refusing to consider the silencers offered as physical exhibit in connection with a motion for a new trial?
(7) Did the court err in refusing to strike out the Plaintiff's Exhibits 2, 3, 4, and 5?
(8) Should the defendant have been permitted to show that the Plaintiff's Exhibit J was a routine letter?

We approach these questions in the order in which they are presented in the brief:

1. It is argued that plaintiff's case depends wholly upon the testimony of Mr. Hall, and that the weight of testimony is against him. An examination of the record does not sustain this contention. It shows a sharp conflict in the testimony; witnesses flatly contradicting each other. There are letters and order sheets that standing by themselves tend to support the testimony of Mr. Hall. There is testimony on the part of defendant explaining these letters and the giving of the order sheets, which explanation, if accepted, would

Digitized by Google

do away with that tendency. There were two payments made by the defendant which tend to support the claim of the plaintiff. Explanations are made of the circumstances under which these payments were made, which explanations, if accepted, would remove that tendency. All this testimony is within the domain of fact, and presented a case for the jury. *Gardiner* v. *Courtright*, 165 Mich. 54 (130 N. W. 322), and the many cases cited therein. *Druck* v. *Lime Co.*, 177 Mich. 364 (143 N. W. 59), and the cases cited therein.

2. Should the motion for a new trial have been granted on the ground of newly discovered evidence? In overruling the motion the trial court said:

"The so-called newly discovered evidence is no more than cumulative upon one of the issues presented by defendant at the trial. Defendant's witness Bert Woodruff testified that he examined all the silencers sent out by defendant, and that none of them had a flange, and now to open the case for the purpose of letting others testify that the silencers Woodruff examined and others did not have flanges and to bring some of such silencers into court would only be adding some testimony to that already in the case."

A reference to the record shows that Mr. Woodruff was employed in the stockroom, and that he examined all of the silencers that came to the stockroom, and that:

"Those silencers were not provided with a flange at the inlet end. * * *

"*Q.* Then the figure that you have marked here with the pencil is the figure that you identified as being the same as the silencer that you examined?

"*A.* The same as the silencer I was taking care of in the stock room.

"*Q.* Were there a large number of these silencers?

"*A.* The nearest I could remember was something near 10 or a dozen that were taken care of especially by me and examined. There may have been more, but not handled by me. All I remember is approximately 10 or 12 that I personally handled."

Digitized by Google

The amended declaration was filed in April, 1914. In referring to the contract which is the basis of this litigation, it is said:

"For that whereas heretofore, to wit, on the 11th day of March, 1911, at New York, in the State of New York, the plaintiff and defendant entered into a contract whereby the plaintiff agreed to manufacture and sell to plaintiff (defendant) a quantity of specially manufactured engine parts to wit, 275 Hydrex engine exhaust silencers, and the said defendant agreed to accept and pay for the same the sum of $955.35."

The case was tried in December, 1914, so that for eight months before the trial defendant knew it was claimed the silencers were of special manufacture. The motion for a new trial was filed within a month after the judgment was rendered. The so-called newly discovered evidence was to contradict the plaintiff when he testified the silencers were of special design and would be along the same line as the testimony of Mr. Woodruff, and is clearly cumulative. It is not explained why, if the same diligence had been used between the filing of the amended declaration and the trial that was used after the trial, the testimony might not have been produced upon the trial.

In *Canfield* v. *City of Jackson*, 112 Mich. 120 (70 N. W. 444), it was said:

" 'A motion for a new trial upon the ground of newly discovered evidence is not regarded with favor. The policy of the law is to require of parties care, diligence, and vigilance in securing and presenting evidence.' Elliott, App. Proc. § 857. To entitle one to a new trial upon this ground it should be shown: *First*, that the evidence, and not merely its materiality, be newly discovered; *second*, that the evidence be not cumulative merely; *third*, that it be such as to render a different result probable on a retrial of the cause; *fourth*, that the party could not with reasonable diligence have discovered and produced it at the trial. Hayne, New Trial & App. §§ 88-92, and many cases there cited; *Gray* v. *Barton*, 62 Mich. 186 [28 N. W. 813]."

Digitized by Google

We do not think there has been such an abuse of the discretion of the trial judge as to call for our intervention. See *Burke* v. *Traction & Electric Co.*, 147 Mich. 172 (110 N. W. 524); *Leonard* v. *Leahy*, 169 Mich. 406 (135 N. W. 335); *National Surety Co.* v. *Grant*, 177 Mich. 348 (143 N. W. 5).

3. Did the court err in his charge to the jury relative to the special design of the silencers? It is the claim of counsel for defendant that the court erred in that part of the charge which we have quoted by omitting any reference to the obligation of the plaintiff to minimize the loss. Counsel say it is not sufficient that goods should be "specially ordered," but it is also essential that the goods should have had no market value. We have been unable to find in the record any request proffered on the part of the defendant asking the judge to charge upon the subject of minimizing the loss.

In discussing the respective rights of the vendor and vendee the following has been stated:

"The vendor of present property in a suit against the vendee, for not taking and paying for the property, has a choice ordinarily of one of three remedies: (1) He may store or retain the property for the vendee and sue him for the entire price; (2) he may sell the property, acting as agent for this purpose of the vendee, and recover the difference between the contract price and the price of resale; or (3) he may keep the property as his own and recover the difference between the market price at the time and place of delivery and the contract price." Benjamin on Sales (7th Am. Ed.), p. 820.

In 1 Mechem on Sales, § 754, it is said:

"Under a contract for the manufacture of an article, as for the building of a ship or the construction of any other chattel, not existing in specie at the time of making the contract, it is the general rule that no title vests in the purchaser during the progress of the work, nor until the chattel is finished and delivered, or at least is ready for delivery, and, by tender or other

Digitized by Google

equivalent act is appropriated to the buyer. A few cases hold that the title will not pass until there has been, on the part of the buyer, either an acceptance of the chattel or some "acts or words respecting it from which an acceptance can be inferred." But, by the weight of authority, acceptance by the buyer is not indispensable. If the chattel is produced at the time, and of the kind and quality specified, and in all other respects in compliance with the order, so that the buyer ought to accept it, the title will pass upon a tender or offer of delivery, even though the buyer refuses to accept it."

See, also, *Whitcomb* v. *Whitney*, 24 Mich. 486; *Haynes* v. *Quay*, 134 Mich. 229 (95 N. W. 1082).

In *Black River Lumber Co.* v. *Warner*, 93 Mo. 374 (6 S. W. 210), the following language is used in the opinion:

"Where, however, the subject-matter of the contract is a specific article to be manufactured by the vendor for the vendee, and the vendor has completed his contract, and performed all that the contract requires him to do, it is but just and fair that his damages, in case of a refusal of the vendee to accept the article, should be the contract price. The vendor will, of course, in such case, hold the property for the vendee. And so it has been held in a number of cases. As some of them we cite *Shawhan* v. *Van Nest*, 25 Ohio St. 490 [18 Am. Rep. 313]; *Ballentine* v. *Robinson*, 46 Pa. 177; *Smith* v. *Wheeler*, 7 Or. 49 [33 Am. Rep. 698].

See, also, *Goddard* v. *Binney*, 115 Mass. 450 (15 Am. Rep. 112), and other cases found in the brief of counsel.

5. Did the court err in his rulings about the settlement between defendant and the Lackawanna Manufacturing Company? It is true, as contended by counsel, that both companies had the same manager, and some of the same stockholders, though it is a matter of dispute when Mr. Hall severed his relations with the Lackawanna Manufacturing Company, but it is a fact that the corporations were separate entities. To

Digitized by Google

enter upon the terms of settlement between the defendant and a corporation not a party to the record would open a new field of inquiry. Could plaintiff dispute what was claimed by defendant as to the settlement? To ask the question is to suggest that a new issue would be presented which is not the subject of litigation herein. The pivotal question was, Between whom was the contract made?

We have discussed the important and determining questions, and will content ourselves with saying we have examined the other assignments of error, and think them not well taken.

Judgment is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

PAPINAW v. GRAND TRUNK RAILWAY CO. OF CANADA.

1. APPEAL AND ERROR—CERTIORARI—MASTER AND SERVANT—WORKMEN'S COMPENSATION—INDUSTRIAL ACCIDENT BOARD—DEATH.
   Upon certiorari to review an award of the Industrial Accident Board, its findings of fact, in the absence of fraud, are conclusive.

2. MASTER AND SERVANT—DUTIES—TRESPASSERS — NEGLIGENCE—RAILROADS.
   Where decedent was a section foreman, having supervision over switches, and was charged with sending reports to his employer of the time of his crew at regular intervals, and was also required, as part of his duties, to look after the cleaning of the switches in case of a storm, and to attend to this duty at night if necessity required, it could

Digitized by Google

not be found, as a matter of law, that he was off duty one stormy night in winter when he left home, as he announced, to mail his report, saying that if he was out late he would be working on the switches, and when it was the last night for the mailing of the report and the employee was found killed, about midnight, on the section of tracks of which he was in charge.

3. SAME—TRESPASSERS.

In performing either duty, deceased was not a trespasser on the right of way, which he used as a way to reach the depot of the respondent.

4. SAME—EVIDENCE—BURDEN.

The burden rested on the master to prove that the accident happened while the employee was not performing his duties, upon proofs tending to show that he was

5. SAME.

And his position was distinguishable from those of employees who were not compelled to be at the master's call at any time, but had fixed hours of labor.

Certiorari to the Industrial Accident Board. Submitted October 21, 1915. (Docket No. 11.) Decided December 21, 1915.

Rose Papinaw presented her claim against the Grand Trunk Railway Company of Canada for compensation for the killing of her husband. From an award made, the respondent corporation brings certiorari. Affirmed.

W. K. Williams (*Harrison Geer*, of counsel), for appellant.

J. C. Lehr, for appellee.

STEERE, J. The husband of applicant, Alfred Papinaw, who had been for several years section foreman for respondent, was killed during the night of January 30, 1914, on its track between his residence and what is called the Tunnel depot of respondent's road in the city of Port Huron. On her application

Digitized by Google

for compensation under Act No. 10, Pub. Acts 1912 (Extra Session), the Michigan Industrial Accident Board found that his death arose out of and in the course of his employment, and therefore awarded her the full compensation provided in such cases.

The known facts and circumstances relating to Papinaw's death are practically undisputed. Respondent contends that the award was erroneous because it cannot fairly be found as a matter of fact, from any competent evidence in the case, that his death did so arise.

Deceased's section commenced at what is known as Tappan Junction, which was about 1¾ miles west of the Tunnel depot, and extended several miles westerly toward Detroit. He resided with his family near the east end of his section, about 150 feet north of respondent's tracks, on the west side of the Junction road which runs north and south, crossing respondent's tracks a short distance east of Tappan Junction. His daily duties as section foreman required him usually to work upon the track with his section crew from about 7 o'clock in the morning until 5:30 in the evening, the time varying somewhat with the season of the year. It was also his duty to patrol the track Sunday mornings and keep a yard interlocking light burning at night, and relight it in case it went out during the night. Between his section and the Tunnel depot was another section in charge of a different foreman, called the Tunnel freightyard section. In this section were numerous switches, five of which near the Tappan Junction road crossing it was the duty of deceased to look after in case of storm. It was his custom when nothing out of the ordinary arose, and there was no indication of storm, to retire early. He was subject to be called out at any time of night in case of a wreck or to clean the switches in event a storm rendered it necessary. Another of his duties was to keep the time

Digitized by Google

of his crew and daily enter it on a time book from which he made out their check pay rolls at his home as opportunity arose, and mailed them at the Tunnel depot to respondent's superintendent in Detroit. This was required to be done for the first half of each month in time to reach the Detroit office not later than the morning of the 14th, and for the last half not later than the first day of the ensuing month. The section hands worked by the day with extra pay for overtime, but section foremen were then paid monthly wages of $62.50, which covered whatever services they rendered during the month, and were required to be on call at all times. If they wished to be away beyond call over night or on Sunday they had to secure permission from the roadmaster, while the section hands were at liberty to go and come as they pleased on nights and Sundays.

There was a street, called Griswold, running east and west on the north side of respondent's tracks, but not parallel with them, at a distance of about 4 blocks from the Tunnel depot and about 2½ blocks from respondent's west-bound track at the Junction road near where deceased resided. This was outside of the city limits, similar to a country road. The railroad men, including deceased, who resided near Tappan Junction, were accustomed to use the railroad tracks in going to and returning from the Tunnel depot, it being more convenient and direct than by the street.

Deceased's education was limited and it was hard for him to correctly prepare his pay rolls and reports. He worked at this task the evening before until midnight, and on the afternoon of January 30th, at about half past 3, returned home to complete making them out, which he practically finished about supper time. After supper he signed the paper and his wife addressed the envelopes containing them. He then left home, at about 6:30 o'clock, for the purpose of mailing them at

Digitized by Google

the Tunnel depot, as was customary and in accordance with his instructions, that they might be received in Detroit the next day. There is no direct evidence of his movements from that time. These papers were mailed that evening at the Tunnel depot and went out on a train which left at 6:55, being received in Detroit the following day. Some time about midnight his remains were found by a switchman on respondent's tracks, badly mutilated and cut to pieces, portions being scattered along and frozen to the track, at a locality variously stated as from about a block and a half east of Tappan Junction to 1,300 feet east of the Junction road. It was a dark, stormy night with a mixture of rain and snow flying and falling. His wife testified that he seldom went to the city at night and never to the tunnel except on the nights when it was his duty to mail his pay rolls and reports; that on leaving this night he commented upon its being dark and stormy, telling her that if he was late she could know that he was out working on the switches.

Between when deceased left home and his remains were discovered, the time of his death is necessarily indefinite. The undertaker who was summoned shortly after their discovery and cared for the remains testified that they were strung along the track 75 or 100 feet, some parts frozen to the rails or ties so that he had difficulty in loosening them; that it was a "cold, nasty, raw night," and he thought from the condition of the body, which he judged had been dead an hour and a half or two hours, that more than one train ran over him; that "one had taken him one way and another brought him back."

In considering this case we start with the well-settled proposition that if the facts proven are capable as a matter of law of sustaining the inferences of fact drawn from them by the Industrial Accident Board, its findings are conclusive, in the absence of fraud, and the

Digitized by Google

appellate court is not at liberty to interfere with them. Section 12, part 3, of the industrial accident law (Act No. 10, Pub. Acts 1912 [Extra Session]), has been too often and recently so construed by this court to require citation of cases. This is but an application under the statute of the comprehensive and fundamental principle universal in courts of law, that whether there is any competent evidence is for the court to determine, but whether the evidence is sufficient is a question for the jury, the function of the accident board being in that respect those of a jury in actions at law.

This case is readily distinguishable from that line of decisions cited by respondent in which the employee by his contract of hiring was engaged to work during certain hours, and was injured away from his place of employment, while going to or returning from work, or was absent during some intermission for meals, or otherwise, not then upon his employer's business nor subject to his control, at liberty for the time to go where and do what he pleased, free from any claim of the employer upon his services. Here it is shown conclusively that by his contract of hiring deceased was at the time of his death required to be within reach, liable at any time to be called to work upon the track, and in that sense on duty subject to his employer's orders and control. His wife and his fellow foreman, of the section east of his, so testified, as also respondent's supervisors of tracks who said, in part:

"The section foreman is supposed to be on call at any time, in case of trouble with the switches. * * * I gave him (Papinaw) instructions with reference to those switches because he lived near, and was the nearest man to be called. Sharrard lived near the Tunnel depot. Although it was on Sharrard's section I gave Papinaw orders that in case of storm to look after the cleaning of those switches. * * * He was supposed

Digitized by Google

to be on call in case the tracks got in bad condition of repair so that he could get there without tying up traffic. * * * If the foreman has not gone to bed before it starts storming he is supposed to go out himself without being called."

Especial and extra duties rested upon deceased that night. He was required to be on call. It was a stormy night, of a kind requiring unusual vigilance as to the switches, and it was imperative that he mail his pay rolls at the Tunnel depot before the evening train left so that they would be in Detroit on the day required. He worked upon those papers until supper time and started after supper for the Tunnel depot to mail them, leaving word with his wife which would keep him in touch with his employer during his absence, as near as possible. It is conceded that he mailed the papers that evening, and they reached their destination on time. It was his duty after mailing them to return and either be at home on call or looking after the switches near by. His last words, so far as there is any proof, show such was his intent, and that he left with this duty on his mind. He was in the habit of retiring early when there was no indication of a storm. Under the terms of his employment it was as much his duty to return to his home, or the switches near there after mailing the papers at the Tunnel depot as it was to go there for that purpose. In going he started along respondent's track, and presumably went that way, as was his custom and that of other employees of respondent, because it was more convenient and the distance to the tunnel shorter than by any other route. He was a section foreman whose special work was to be upon, travel along, and care for his employer's track. He was not a trespasser upon its right of way in any sense which would deny relief under this act, and no question of his negligence is involved in this proceeding. The place and cause

Digitized by Google

of his death are readily inferable from the facts proven. Respondent's counsel say:

"He was in the act of going to his home at the time he was killed."

If so, under the circumstances of this case, he was performing a duty in the line of his employment out of and in the course of which the accident which caused his death befell him. The accident occurred while he was doing that which a man so employed can reasonably do, and ought to do, and was injured at a place on his employer's premises where, under the proven circumstances, his combined duties made it reasonable that he should be; and there is no proof that he was there for any other purpose than on his return in completing a trip to the Tunnel depot, in the line of his employment, to the place where his employment required him to be on call or at work, and where he would have been during that evening but for the necessity of the trip.

This claim is by a dependent of a workman who was accidentally killed, and whose evidence is therefore not available. In *Grant* v. *Railway Co.*, 1 B. W. C. C. 17, it is said:

"If in such a case facts are proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, I think it falls on the employer, if he disputes the claim, to prove that the contrary was the case."

That an employee, not actually at work, is on duty if required to be at a certain place on call and ready for work, is held in *St. Louis, etc., R. Co.* v. *Welch*, 72 Tex. 298 (10 S. W. 529, 2 L. R. A. 839), where it is said of a member of a railroad bridge gang injured while sleeping in a bunk car provided by his employer:

"The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for

Digitized by Google

that purpose, which was placed upon its side track. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors, we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment and who are injured during the intervals in which the master has no claim upon his services."

The arbitration committee and Industrial Accident Board were at liberty in determining the facts in this case to draw all rational and natural inferences from the evidentiary circumstances shown. To infer and find that the accident, which resulted in Papinaw's death, arose out of and in the course of his employment, had evidential support, and was neither unnatural nor irrational.

The decision of the Industrial Accident Board is therefore affirmed, with costs to appellee.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

MATWICZUK v. AMERICAN CAR & FOUNDRY CO.

MASTER AND SERVANT—NOTICE OF INJURY—COMPENSATION—AGENCY—RATIFICATION.

Where a brother-in-law of decedent employed an attorney, who gave the employer notice of his death, in compliance with the workmen's compensation act, within the statutory three months period, and within six months had

Digitized by Google

the wife, who resided in a foreign country, execute a power of attorney ratifying the giving of notice, but did not receive the instrument within the six months, the notice was sufficient, as it afforded an opportunity to investigate. Act No. 10, Extra Session 1912.[1]

Certiorari to the Industrial Accident Board. Submitted October 12, 1915. (Docket No. 62.) Decided December 21, 1915.

Maryanna Matwiczuk presented her claim for compensation under the workmen's compensation act against the American Car & Foundry Company for the death of her husband. From the award entered, contestant brings certiorari. Affirmed.

L. A. Koscinski, for claimant.

E. D. Alexander, for defendant.

MOORE, J. This is certiorari to review the action of the Industrial Accident Board in confirming an award made in favor of the claimant. The questions involved are so clearly stated in the opinion rendered by the board that we quote from it:

"It is conceded in this case that Joseph Matwiczuk, the husband of the applicant, met his death on May 22, 1913, as a result of the injuries received while in the employ of respondent. It is undisputed that the injuries resulting in his death arose out of and in the course of his employment, and that his widow would be entitled to the compensation fixed by law, if claim therefor was made within the time fixed by the compensation act. It is undisputed that, on the day following the death of deceased, his brother-in-law, Joseph Postinack, consulted an attorney in the city of Detroit, and that said attorney wrote a letter to respondent, notifying it of the death of Joseph Matwiczuk, and further stating that his death was due to an injury re-

[1] On sufficiency of notice of injury under employer's liability acts, see notes in 21 L. R. A. (N. S.) 233.

Digitized by Google

ceived while working for respondent, that deceased had a wife and four children living in Poland, who were dependent upon him, and closing the letter as follows:

"'If you care to offer reasonable compensation, in settlement, there is no doubt that it will be considered. Awaiting an immediate reply, I remain. [Signature.]'

"The widow of deceased in fact resided in Poland as stated in said notice, and the brother-in-law of deceased above mentioned assumed to act for her in consulting said attorney and making the aforesaid claim. It is conceded that Postinack, at the time he consulted said attorney, had not been authorized so to do by the widow, as this was done very shortly after the death, and before the widow even had knowledge of the accident; her residence being in a small town in the interior of Poland. It is contended in this case that the claim made through the action of Postinack is a nullity, because he was not authorized so to act, and that the letter from said attorney did not constitute the making of a claim for compensation within the meaning of the law.

"In the opinion of the board the provision of the compensation law relative to making claims for compensation should not be technically construed, and that the communication which was sent to the employer in this case was sufficient to fairly apprise it of the fact that compensation was claimed for the death of the decedent. The essential function to be performed by notice of claim for injury under this law is to bring home to the employer at some time within six months after the accident knowledge of the fact that a claim for compensation therefor is being asserted. We think that the letter in question must be held to have fairly apprised respondent of this fact. At the time of making the claim, Postinack had not been authorized to act for applicant as before stated, but about five months after the death of deceased applicant executed at her home in Poland a written power of attorney authorizing Postinack to act in her behalf in all things relating to the prosecution of her claim for compensation. When this power of attorney reached Postinack in this country a little more than six months had elapsed since the death of decedent, and it is con-

Digitized by Google

tended by respondent that the power of attorney did not take effect until it was actually delivered in this country, and that being after the expiration of the six-months period, it could not operate as a ratification of the previous acts of Postinack. This contention is largely technical and without merit. We are inclined to the opinion that the mailing of the power of attorney in Poland constituted a sufficient delivery. We are unable to find any provision in the act requiring the person who makes the claim on behalf of the dependents of a deceased workman to be a fully authorized agent. It is the evident intention of the law that such claim may be made by near relatives or friends, without formal authorization from the dependents. To hold otherwise would defeat compensation in many cases where the dependents of deceased workmen live in distant lands, or where such dependents are minors. The decision of the committee on arbitration awarding compensation to the applicant is affirmed."

Counsel for appellant argue two propositions:

(1) Was the letter sent by Daniel Minock to the American Car & Foundry Company a claim for compensation such as is contemplated by the terms of the workmen's compensation act?

(2) If this letter was a claim sufficient to comply with the terms of the workmen's compensation law, was it sufficiently authorized to be binding upon the American Car & Foundry Company?

Under the first of these propositions it is argued that when the attorney sent the letter he was not presenting a claim under the compensation law, but had in mind liability under the common law for negligence. Under the second proposition it is urged that the power of attorney did not take effect until after the six months had expired, and that, as the claimant could not file a claim at that time, she could not ratify what has been done before. It is also claimed that the power of attorney related to the future, and not to what had already been done. Counsel for appellant admit that the propositions involved in this case are new and therefore undecided.

Digitized by Google

It may be helpful to quote in full the letter which was sent:

"DETROIT, MICH., May 22, A. D. '13.
"American Car & Foundry Co.
"*Gentlemen:*

"Joseph Posternack, who resides at No. 621 Palmer Ave., this city, informs me that his brother-in-law was killed while working in your employ about 1 p. m. Wednesday, May 21, A. D. 1913.

"He claims that his brother-in-law, whose name is Joseph Matfechuck was working on an electric drill, that the electric wires were not properly insulated and that the wires were lying in water, that owing to that fact that when this man came in contact with the wires he received a shock through his body which finally caused his death.

"This man is married, and his wife and four children are living in Poland, and are and were dependent on him for their support and maintenance. If you care to offer a reasonable compensation in settlement, there is no doubt that it will be considered.

"Awaiting an immediate reply, I remain,
[Signed] "DANIEL L. MINOCK."

The record discloses that the claimant was advised of the death of her husband. It does not appear whether she was advised of the sending of the letter just quoted. On October 28, 1913, she executed before a notary public a formal power of attorney authorizing her brother Joseph Postinack to look after her claim growing out of the death of her husband. The concluding part of the power of attorney reads as follows:

"Said Mary Matwiczuk hereby consents to and agrees with everything that said Joseph, son of Michael Pasternak, her duly appointed attorney in fact, or his duly selected attorneys, may legally do or perform, and she further ratifies any of their actions."

By due course this power of attorney reached her brother, Joseph Postinack, though not until more than six months after the death of her husband.

Digitized by Google

We may now consider the compensation law (Act No. 10, Pub. Acts 1912). The provisions of the compensation law applicable are section 15 of part 2, which reads:

"No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same," etc.

And section 16, which reads:

"The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his dependents or by a person in their behalf."

Section 18 provides:

"Want of such written notice shall not be a bar to proceedings * * * if it be shown that the employer had notice or knowledge of the injury."

See, also, *Purdy* v. *City of Sault Ste. Marie*, 188 Mich. 573 (155 N. W. 597), in which an opinion was handed down this term.

It is clear that what was done gave the employer notice of the injury, thus affording an opportunity for a full investigation. It also gave notice of who were dependents. We think it is also clear that the company was informed that the brother-in-law, by employing the attorney who wrote the letter giving this information, was seeking to protect the interests of the widow and minor children, who were in Poland, and the inference follows almost as of course that a claim was urged in their behalf, growing out of the death of the husband and father. The language of the statute indicates that the notice and claim might be in ordinary language, and might be signed by dependents "or

Digitized by Google

by a person in their behalf," and what would be more natural than to assume that a brother of the widow in her absence would act for her.

What was done gave to the employer every opportunity to investigate the accident, and knowledge of all material things relating thereto, as fully as though an application had been made in a formal way by the widow upon the day when the letter was written. The next day after the injury the employer was notified of it, the result of it, the time and place and cause of its happening, and of the persons who were dependent. This notice was given, not by an outsider, but through the agency of the brother-in-law of the deceased, the brother of the widow. What was done was notice of a claim by the deceased's dependents, made by a person in their behalf. We think it too technical to say that a notice and claim made within 24 hours after the accident, caused to be given, as in this case, in behealf of the widow, who could not make the claim herself, because of the distance from where she lived, which action was ratified by her on being advised of the situation, must fail because the ratification did not reach this country within 6 months from the time of the accident. To so hold would not be according to the letter or the spirit of the employers' liability act.

The action of the Industrial Board is affirmed.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

Digitized by Google

COOK *v.* MICHIGAN CENTRAL RAILROAD CO.

1. RAILROADS—DEATH — MASTER AND SERVANT — LIABILITY FOR TORTS—NEGLIGENCE.

Where defendant's special officer, empowered to police its yards and prevent any one from stealing freight or damaging property, to look out for suspicious characters and to put out persons who were not in the yards on business, was suddenly seized by two men, who seemed to him to be a couple of intruders that he had expelled on the previous day, and who had threatened him with violence, so that he was excited and lost his head, and shot both assailants, who proved to be acquaintances of the officer, and not the parties he supposed them to be, the right of decedent to recover for the alleged reckless or negligent act of the officer of defendant railway company depended on whether he acted in self-defense only, or in the performance of his duties, having in mind the purpose of protecting his employer's property.[1]

2. SAME—QUESTIONS FOR A JURY.

It could not be decided, as a matter of law, which intent actuated the employee in firing upon the persons who assaulted him; the question was one of fact and should have been submitted to the jury.

3. SAME—AUTHORITY TO EJECT—RESPONDEAT SUPERIOR.

Any act done through lack of judgment, discretion, or from infirmity of temper or under the influence of passion, somewhat beyond the strict line of the servant's authority, is chargeable to the master, and the law will not undertake to fix with precision the line that distinguishes the act of the servant from the act of the individual; so that if in the discharge of his duties the employee lost his head and exceeded the force that he was authorized to use, the defendant was liable.

---

[1] On master's civil responsibility for the wrongful or negligent act of his servant or agent towards one who has no claim upon the master by reason of a contract incipient or perfected, see note in 27 L. R. A. 161.

Digitized by Google

4. SAME—EVIDENCE—WITNESSES—SERVANT OF DEFENDANT.
A servant and agent of defendant railroad company, called for cross-examination under Act No. 307, Pub. Acts 1909, might be contradicted by the plaintiff, as if defendant had called the witness in its own behalf.

Error to Wayne; Hosmer, J. Submitted April 14, 1915. (Docket No. 31.) Decided December 22, 1915.

Case by Esther M. Cook, as administratrix of the estate of Frank J. Cook, deceased, against the Michigan Central Railroad Company for the unlawful killing of plaintiff's intestate. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed

Frederic T. Harward (*John J. Gafill*, of counsel), for appellant.

J. W. Dohany (*Frank E. Robson* and *Henry Russel*, of counsel), for appellee.

BIRD, J. In the early evening of August 11, 1911, William Burnett shot and killed Frank J. Cook and Daniel Vreeland in the Michigan Central freightyards in West Detroit. Burnett was a special officer or night watchman for the Michigan Central, and Cook and Vreeland were employed in a like capacity for the Lake Shore & Michigan Southern Railway Company, whose yards lie immediately north of and parallel with the Michigan Central yards, in the vicinity of Junction, Campbell, and Livernois avenues. Cook and Vreeland had entered the Michigan Central yards at Campbell avenue and were crossing them to reach their beats in the Lake Shore yards when the shooting occurred. Burnett's excuse for shooting them was that he mistook them for two suspicious characters whom he had driven out of the yards by force on the previous evening. The wife of Cook, as administratrix of her husband's estate, brought this suit against the Michigan

Digitized by Google

Central to recover for the negligent killing of her intestate.

As there were no eyewitnesses of the shooting save Burnett, he was called by plaintiff for cross-examination under Act No. 307, Pub. Acts 1909. At the close of plaintiff's proofs, the trial court directed a verdict for the defendant, on the ground that it had not been made to appear that Burnett was acting within the scope of his employment at the time of the shooting. It was the claim of the defendant that Burnett's act was one purely of self-defense.

1. To determine whether the trial court was wrong in its position, it will be necessary to consider somewhat in detail the material facts attending the shooting, and also the duties and authority of Burnett. Burnett testified that it was his duty "to look after the yard in general to see that no one molested any of the cars, to see that no one took anything out of the yards, except by proper authority, and to see that no suspicious characters whatever were loafing around in the yards, to find out every person's business who seemed to be suspicious in the yard, and, if they had no business in there, to put them out." He further testified that Mr. Dwyer, his senior officer, who hired him, instructed him that he was to be "special officer in the yard, to patrol the yard, to examine the cars to see whether the seals were broken or not, to see that no one broke into the cars and stole things, and to keep characters or people who had nothing to do with the railroad company off the property; yes, and to look after the railroad property in general." Burnett's version of the affair was that, while he was walking between two rows of freight cars about three feet apart, standing on the yard tracks just south of the main line, these two men came out from the end of a car about six inches ahead of him and took hold of him. That one took hold of his neck and one his arm, and

Digitized by Google

began to tussle with him. Beyond this he does not make it clear what they attempted to do with him. He further says that they did not try to strike him, nor did they hurt him, nor did they say anything, except, "We have got you now, old Pal;" that, so far as he knew, they carried no firearms; that he thought they were two men whom he had ejected from the yards in a rough manner the night before at nearly the same place; that without giving them any warning or show whatever, he fired. He aimed at their hearts and shot to kill. They were only about three feet away when he fired. He was armed with an automatic Smith & Wesson revolver, capable of shooting five times. It was dark, and he could not distinguish faces. He had met Cook and Vreeland before and knew they were special officers of the Lake Shore. He admitted that he was rattled and "kind of lost his head." He claimed he was acting in self-defense.

That the master is liable for the negligence of a servant while acting as such and within the scope of his employment, is a proposition of law that is recognized by both parties. The variance between counsel arises and the difficulty begins when an attempt is made to apply the rule to the facts of the case. It is contended by plaintiff that at the moment of the shooting Burnett was acting within the scope of his employment. Defendant insists that he was not so acting, but was engaged solely in an act of self-preservation. The test in such cases appears to be: Did Burnett at the time have in mind the furtherance of his master's business? If he did, then the master is liable, whether the act was done negligently or recklessly. If he did not have in mind the furtherance of his master's business, but only his own self-preservation, then the master is not liable. *Sharp* v. *Railroad Co.*, 184 N. Y. 100 (76 N. E. 923, 6 Am. & Eng. Ann. Cas. 250); *Layne* v. *Railway Co.*, 66 W. Va. 607 (67 S. E. 1103); *Magar* v. *Hammond*,

Digitized by Google

183 N. Y. 387 (76 N. E. 474, 3 L. R. A. [N. S.] 1038); *Fleming* v. *Knitting Mills*, 161 N. C. 436 (77 S. E. 309).

In getting at the viewpoint of Burnett, I think we should assume that the parties killed were the suspicious characters whom he had driven from the yard the previous night. And we must assume that Burnett, in doing what he did was actuated by no malice. He says that certain car seals had been broken and some merchandise taken therefrom, and that he suspected these parties of having done the work, and therefore he forcibly ejected them from the yard. When leaving, they made certain threats against him. They reappeared (as he thought) the second night. They came upon him so suddenly that he had no time to drive them out as he had done on the previous night. He struggled with them for not to exceed 2½ minutes before he fired. During that time did Burnett have in mind to drive them out again, as he had on the previous night? Did he still believe they had evil designs on his master's property? Did he have in mind his duty to his master to care for its property as well as his own self-preservation? And would he have fired on them had it not been for his authority as a special officer and as guardian of his master's property? Or was he unmindful of all these things, and engaged in the struggle solely as an act of self-preservation? These are questions which we cannot answer. They are questions of fact which ought to be determined by a jury. *Sharp* v. *Railroad Co.*, 184 N. Y. 100 (76 N. E. 923, 6 Am. & Eng. Ann. Cas. 250); *Layne* v. *Railway*, 66 W. Va. 607 (67 S. E. 1103); *Magar* v. *Hammond, supra; Fleming* v. *Knitting Mills*, 161 N. C. 436 (77 S. E. 309); *Heenrich* v. *Car Co.* (D. C.), 20 Fed 100; *Redding* v. *Railroad Co.*, 3 S. C. 1 (16 Am. Rep. 681); *Winoker* v. *Warfield*, 136 Ga. 742 (71 S. E. 1051); *Barden* v. *Felch*, 109 Mass. 154; *Rounds* v.

Digitized by Google

Railroad Co., 64 N. Y. 129 (21 Am. Rep. 597); 1 Thompson on Negligence, § 615; *Bouwmeester* v. *Railroad Co.*, 67 Mich. 87 (34 N. W. 414). The testimony was such that the jury might have found either way, that he did or did not have in view his master's business.

Much reliance is placed by defendant upon the case of *Holler* v. *Ross*, 68 N. J. Law, 324 (53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546), which is somewhat similar on the facts, to show that the question of the master's liability was one for the court, and not for the jury. The principal difference in the facts of that case and the present one is that the servant in the case cited had no authority to drive any one from the dock. The dock did not belong to his master. The servant's only duty was to guard his master's property located upon the dock by permission. In the present case the yards were owned by the master, and Burnett had been authorized to eject certain classes of persons therefrom. These facts in the case cited sustaining the distinction evidently had much weight with Mr. Justice Fort in reaching the conclusion which he did, that it was a question for the court, as he mentions them and comments thereon. One of his associates, Mr. Justice Pitney, dissented. But, even if the present case cannot be distinguished on the facts from the case cited, I am of the view that the facts in the latter one should have been submitted to the jury under the reasoning of the cases heretofore cited.

2. But it is contended that Burnett exceeded his authority given him by the defendant, and that in shooting the men he was acting in pursuance of some purpose of his own. It appears from the testimony that Burnett was placed in the yards and instructed to do certain things, namely, to put stragglers, suspicious persons, and persons having no business with the company out of the yards. He was authorized to eject such

Digitized by Google

people from the yards, but no instruction was given him as to how much force he should use or in what way he should use it. Much was left to his discretion to decide when and under what circumstances persons were to be ejected and how and in what manner they were to be ejected. Under such authority, if in the discharge of his duty he "kind of lost his head" and went further and used more force than he was authorized to use, the master is liable. *Rounds* v. *Railroad Co.*, 64 N. Y. 129 (21 Am. Rep. 597); *Howe* v. *Newmarch*, 12 Allen (Mass.), 49; *Robards* v. *Pipe Co.*, 130 Ky. 380 (113 S. W. 429, 18 L. R. A. [N. S.] 923, 132 Am. St. Rep. 394).

In the last-mentioned case the rule was stated to be that:

"The master who puts the servant in the place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."

It was further said in this connection that:

"Furthermore, the law, under such circumstances, will not undertake to make any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong.'

See, also, *South Covington, etc., R. Co.* v. *Cleveland*, 100 S. W. 283, 30 Ky. Law Rep. 1072, 11 L. R. A. (N. S.) 853; *New Ellerslie Fishing Club* v. *Stewart*, 123 Ky. 8 (93 S. W. 598, 9 L. R. A. [N. S.] 475; 1 Thompson on Negligence, §§ 554-563.

Digitized by Google

3. We think plaintiff was entitled to contradict the witness Burnett, either by himself, or by other witnesses. Act No. 307, Pub. Acts 1909, gives the party calling the witness the same rights in that respect as it would had defendant called the witness in its behalf.

In view of the conclusions reached, the judgment must be reversed, and a new trial ordered.

STONE, MOORE, and STEERE, JJ., concurred with BIRD, J.

BROOKE, C. J., and KUHN and OSTRANDER, JJ., concurred in the result.

The late Justice MCALVAY took no part in this decision.

OTTO v. ANN ARBOR RAILROAD CO.

RAILROADS—CONTRIBUTORY NEGLIGENCE—CROSSINGS—ANIMALS.

The failure on the part of a boy driving across a railroad track to look for a car, after he had reached a point 90 feet from the rails, barred a recovery for a horse killed, where he looked in one direction and then devoted his attention to the other side, and if he had turned to look again within 70 feet of the crossing he might have seen the approaching car, and where he was 12 years of age and knew the nature of the danger, etc.

Error to Washtenaw; Kinne, J. Submitted October 8, 1915. (Docket No. 27.) Decided December 22, 1915.

Digitized by Google

Case by Gustavus Otto against the Ann Arbor Railroad Company for the negligent killing of a horse. Judgment for plaintiff. Defendant brings error. Reversed; new trial denied.

Alexander L. Smith and *Gustavus Ohlinger*, for appellant.

Arthur Brown (*E. R. Sunderland*, of counsel), for appellee.

PERSON, J. In the township of Northfield, in Washtenaw county, the tracks of the Ann Arbor Railroad Company run in a northerly and southerly direction across a public highway running east and west, known as the Nannery road. On the afternoon of September 5, 1914, a horse owned by plaintiff, while being driven by plaintiff's son, Lawrence, was struck by one of the so-called gasoline cars operated on defendant's road and injured to such an extent that it had to be killed. This action is brought to recover the value of the horse.

The boy was approaching the railroad track from the west, and was very familiar with the crossing; his home being in the near vicinity. When he had come to within from 90 to 100 feet of the crossing, he slowed his horse down to a walk and looked north, but without seeing any car in that direction. He continued to approach the track, but from that time on confined his attention entirely to the south side of the highway. On that side the view was obscured by a field of standing corn and other obstructions, so that a car coming from the south could not be seen until the traveler had reached the railroad right of way. The boy says that it was because of these obstructions that he gave his attention entirely to the track on the south side. The car that struck the horse came from the north, and was not noticed by the boy until it had reached the cattle guards north of the highway. It was then

Digitized by Google

too late to prevent the horse from going upon the railroad track. The car hit the horse on the left front shoulder and broke its left front leg. From the point where the boy looked north, about 90 or 100 feet west of the railroad track, the view was somewhat obscured by trees and a fence with vines growing upon it; but, if the boy had again looked towards the north at any point within 70 feet of the track, the approaching car could have been plainly seen. On the railroad grounds, 40 rods north of the highway, was the whistling post, and a short distance beyond that the track went into a cut some 8 to 10 feet deep. South of the whistling post, and between that and the highway, was another shallower cut, but the car on the railroad track could have been plainly seen at any point within 30 rods of the highway.

The negligence charged against the defendant company was the failure of its servants to give warning of the car's approach by either sounding the whistle or ringing the bell; and this negligence was fully substantiated by the evidence, inasmuch as the defendant offered no proofs at the trial. The defense insisted upon is that the boy was guilty, upon his own showing, of contributory negligence in going upon the track without again looking north before doing so; and the court was requested to instruct the jury to that effect. This was refused; and the jury gave the plaintiff damages to the amount of $250.

The instruction requested should have been given. It is true that this boy driving the horse was some 3 months under 12 years of age; but from his own testimony it is clear that he understood the dangers in crossing the railroad track as well as any adult would have understood them. He lived nearby, and had made this crossing frequently, not only on foot, but driving as he was this day. He knew fully the necessity of

Digitized by Google

watching for an approaching car, and did, indeed, look towards the north for one, when 90 or 100 feet west of the crossing. The fact that the view to the south was obscured was not a sufficient reason for his failure to cast his eyes again to the north before going upon the track. Had he done so at any point within 70 feet of the crossing, he would have seen the car. His horse was going but little more than 2 miles an hour, was in no fear of the car, and could have been safely stopped almost instantly. From where he did look north, back some 90 or 100 feet, judging by the comparative rates of speed at which the horse and car were going, as shown by the testimony, the latter must have been in, or close to, the deeper cut that has been mentioned. At any rate there were obstacles hiding the view of the car when it was more than 30 rods north of the highway. It was certainly negligence, under the circumstances, for the boy not to look again before getting into a place of danger. The rule, as applied to children, has been so lately and so fully discussed by this court as not to require repetition here. *Mollica* v. *Railroad Co.*, 170 Mich. 96 (135 N. W. 927); *Knickerbocker* v. *Railway Co.*, 167 Mich. 596 (133 N. W. 504); *Perego* v. *Railway Co.*, 158 Mich. 225 (122 N. W. 535); *Trudell* v. *Railway Co.*, 126 Mich. 73 (85 N. W. 250, 53 L. R. A. 271); *Henderson* v. *Railway Co.*, 116 Mich. 368 (74 N. W. 525).

Judgment must be reversed, and no new trial ordered.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

MICHIGAN STATE BANK OF EATON RAPIDS *v.* KERN.

1. HUSBAND AND WIFE—DEEDS—ESTATES BY THE ENTIRETIES—ESTATES IN COMMON.

   A deed executed by a husband to himself and his wife creates a tenancy in common, and not one by the entireties.

2. EXECUTION—HUSBAND AND WIFE—ESTATES IN COMMON.

   The interest of a tenant in common is subject to levy and sale upon execution. 3 Comp. Laws, § 9167.

3. FRAUDULENT CONVEYANCES—EXECUTION—REMEDIES — EQUITY—HOMESTEADS.

   Where complainant's bill to set aside a conveyance by a debtor husband to himself and wife was filed on the theory that said conveyance created a tenancy by the entireties and was in fraud of creditors, and it does not clearly appear that the husband's interest in the estate in common which was thereby created is sufficient to satisfy the judgment and costs, the bill will not be dismissed, but in case the husband's interest in the property is insufficient to satisfy the judgment, complainant may proceed to sell the remainder thereof, except the homestead rights.[1]

Appeal from Barry; Smith, J. Submitted October 15, 1915. (Docket No. 103.) Decided December 22, 1915.

Bill in aid of execution by the Michigan State Bank of Eaton Rapids against George W. Kern and Nettie A. Kern. From a decree for complainant, defendants appeal. Modified and affirmed.

Joseph B. Hendee (*Thomas Sullivan*, of counsel), for complainant.

Colgrove & Potter, for defendants.

[1] On creation of tenancy by entireties by conveyance to spouses, one of whom already had an interest in the land or other subject matter, see notes in 30 L. R. A. 325, 25 L. R. A. (N. S.) 167.

Digitized by Google

BIRD, J. Defendant George W. Kern purchased a stock of general merchandise from one Guy Rueter, in Onondaga, Ingham county, in March, 1911, for the sum of $4,700. He paid Rueter $2,700 in cash, and gave him his promissory note payable in one year for the balance of the purchase price, amounting to $2,000. Subsequently Rueter sold the note before due and for value to complainant. When the note became due, Kern refused to make payment. Suit was instituted by complainant, and a judgment for damages and costs was obtained against defendant George W. Kern for $2,043.10. An execution was taken out and levied upon certain real property situate in the village of Delton, Barry county, the title to which stood in the names of Kern and his wife. This bill was then filed in aid of execution seeking to have the conveyance set aside as having been made in fraud of creditors. The chancellor granted the relief prayed, and defendants have appealed therefrom to this court. They insist that complainant has failed to establish the fact that the transfer of the real estate was fraudulent as to creditors.

It appears that the real estate involved consists of lots 14, 15, and the south half of lot 13 in the village of Delton; the improvements thereon are three store buildings and a dwelling; that the title thereto stood in the name of George W. Kern at or about the time the indebtedness was incurred; and that it was afterwards conveyed by the ordinary form of warranty deed by George W. Kern to himself and Nettie, his wife, and so recorded. Complainant concluded that this action upon the part of defendant Kern placed the legal title of the realty beyond the reach of an execution creditor, and for this reason it seeks in this action the aid of a court of equity.

It has recently been held by this court that such a deed creates a tenancy in common, and not one by the

Digitized by Google

entirety. *Wright* v. *Knapp,* 183 Mich. 656 (150 N. W. 315). See, also, *Pegg* v. *Pegg,* 165 Mich. 228 (130 N. W. 617, 33 L. R. A. [N. S.] 166, Am. & Eng. Ann. Cas. 1912C, 925). After the deed took effect, George W. Kern became a tenant in common with his wife, Nettie. His interest as tenant in common was subject to levy and sale upon execution. 3 Comp. Laws, § 9167.

In view of the fact that the case has been heard and determined on the chancery side of the court, and in view of the further fact that it does not clearly appear from the testimony that the separate interest of George W. Kern in said property, after deducting the homestead interest, is of a value sufficient to satisfy the judgment and costs, complainant's bill will not be dismissed.

The sheriff of Barry county will be advised to proceed to sell the undivided one-half interest of George W. Kern in the premises levied upon, excepting therefrom the homestead interest of defendants, and should insufficient funds be realized upon the sale thereof to satisfy the execution, the complainant may proceed to sell the remainder thereof, except the homestead. Defendants will recover their costs in this court.

BROOKE, C. J., and KUHN, STONE, MOORE, and STEERE, JJ., concurred with BIRD, J.

OSTRANDER, J. (*concurring*). The bill is clearly one in aid of execution, the theory indicated therein being that the deed of March 22, 1911, whatever its legal effect, was made in fraud of creditors. There is testimony supporting the conclusion announced by the circuit court, namely, that the conveyance was made without consideration and for the purpose of defrauding creditors. This conclusion of fact supports the conclusion of law that as to complainant the deed is without force or effect. Of course, this conclusion does

Digitized by Google

not disturb a homestead interest in the property, if such an interest exists. It simply results in permitting the execution creditor to proceed as though the fraudulent conveyance had not been made.

It turns out, as my brother BIRD has pointed out, that the conveyance in question, intended obviously to create an estate by entireties in all of the property described therein, operates to create an estate in common in the judgment debtor and his wife. There is an interest of the debtor which may be reached by execution, whether the deed is or is not set aside. My brother BIRD is therefore of opinion that the decree ought to be reversed and the bill dismissed.

I do not think it is clear that a sale of an undivided half interest in the property, exclusive of the homestead, will make complainant's debt and expenses. The testimony leaves the point uncertain. Assuming the conveyance, the validity of which is attacked, to be fraudulent as to complainant, there is no good reason for refusing to set it aside, limiting the creditor to a sale of an undivided interest in several parcels of property, and inviting a further possible application to the court. It must be kept in mind that the bill in this cause was filed July 10, 1912. At that time it was at least debatable whether the form of the conveyance attacked was not sufficient to create an estate in joint tenancy in defendants. See the cases cited in Mr. Justice BIRD'S opinion. There was propriety in filing the bill in this cause, in aid of execution, it appearing that the title to the property appeared to rest in a husband and wife. It is my opinion, therefore, that the decree should be affirmed.

One has only to examine *Green* v. *Burghardt*, 187 Mich. 136 (153 N. W. 667), to see that it has no application to the state of facts we are now considering. In that case, a court of equity was asked to take over

Digitized by Google

for trial and to determine issues of fact already joined in an action of replevin. There was also another reason for refusing equitable jurisdiction.

The decree should be affirmed, with costs to appellee.

The late Justice MCALVAY took no part in this decision.

McPHERSON *v.* WESTERN UNION TELEGRAPH CO.

1. TELEGRAPHS AND TELEPHONES—NONDELIVERY OF MESSAGE—DIRECTED VERDICT—DAMAGES.

In an action for damages for the loss of a contract of employment, alleged to have been caused by defendant's failure to forward a message to plaintiff on board a steamer at M., where the evidence shows that plaintiff did not arrive at M. till the following day, which was Sunday, and the steamer remained in port Sunday and Monday, and that a delivery on Monday would have enabled plaintiff to secure the position, defendant was not entitled to a directed verdict for the reason that plaintiff was not at M. on Saturday to receive the message had it been forwarded.[1]

2. SAME—DAMAGES—CONTRACT OF EMPLOYMENT.

Where the proposed contract of employment was definite as to salary and term of employment, and the evidence shows that the employer was desirous of engaging plaintiff and plaintiff was desirous of securing the position, it was sufficiently definite in its terms to furnish a basis for recovery, notwithstanding it gave the employer the right to discharge plaintiff for a violation of the rules, and plaintiff had the right to leave before the end of the term if he chose to do so.

---

[1]Generally, on the right of addressee of telegram to sue for delay in delivery, and damages recoverable, see note in 30 L. R. A. (N. S.) 1116.

Digitized by Google

Error to Wayne; Mandell, J. Submitted January 7, 1915. (Docket No. 20.) Decided December 22, 1915.

Case by Russell R. McPherson against the Western Union Telegraph Company for damages for failure to forward a message. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody and *Benj. S. Pagel,* for appellant.

A. Ward Copley, for appellee.

BIRD, J. Mr. F. D. Root, of Sault Ste. Marie, sent to plaintiff, at Detroit, a telegram via defendant's wire, reading:

"Do you want to sail the tug Thompson? If so, wire at once and when you leave?"

The telegram arrived in Detroit between 9 and 10 o'clock on the morning of June 15, 1912. Plaintiff's dwelling was called by phone, his mother answered, and agreed to and did accept the message. Upon reflection it occurred to her that the message should be forwarded to plaintiff at once, so she called the defendant on the phone, and inquired if the message could be forwarded to plaintiff, and the reply was that it could be. She thereupon directed defendant to send it to plaintiff at Milwaukee, Wis., in care of the "Steamer Wisconsin," with the further direction "to be sure and send the message, because it meant a lot to my son." Instead of forwarding the telegram as agreed in the regular way, through some oversight, it never left the Detroit office. Plaintiff had no knowledge of the offer of employment until his boat, the "Wisconsin," passed Detroit on its way down on June 22d, when he received through the marine post office a letter from his wife informing him that a position had been offered him at the Soo. Upon obtaining this information he at once

Digitized by Google

resigned his position on the Wisconsin and came ashore. Later he learned that the place offered him by Root had been filled by another. He then accepted employment on another boat for the balance of the season at a much less salary than that offered by Root, and this suit was instituted, counting upon defendant's negligence, to recover compensation. Judgment passed in his favor in the sum of $487.

1. Appellant takes the position that a directed verdict in its behalf should have followed the conclusion of the proofs, because it was made to appear thereby that plaintiff was not at Milwaukee on June 15th to receive the telegram, had the same been sent in due course of business. It appears that the Wisconsin, instead of arriving at Milwaukee on Saturday the 15th, did not arrive there until early Sunday morning, June 16th, and that she lay in port the 16th and 17th.

The telegram was tendered to and accepted by defendant at Detroit. No further or other address was requested than the one given. It was advised at the time of its acceptance that plaintiff was aboard the steamer Wisconsin, and it thereby became its duty to employ such means to effect its delivery as is usual in making delivery of telegrams addressed to persons en route on railway and steamship lines. The delivery of such telegrams is usually attended with more difficulty than those addressed to persons at their homes or business places. Had the telegram gone forward in due course, defendant's Milwaukee agent would have doubtless made the usual effort to deliver it, and, had he done so, it is quite likely that it would have resulted in his obtaining information when the steamer Wisconsin would arrive, and where she would dock. It appears to be assumed that, if the telegram had gone forward on Saturday, it could have been delivered had plaintiff been there to receive it. If this be so, and the telegram could have been delivered to the steamer Wis-

Digitized by Google

consin on Saturday, had she been there, no good reason suggests itself why it could not have been delivered at the same place on Monday morning when she was there. A delivery as late as Monday morning would have enabled the plaintiff to secure the position by wire. At any rate, whether it could have been delivered was a question which was within the province of the jury.

2. The further contention is made that, if plaintiff was entitled to recover, he was entitled to recover nominal damages only, because his contract was uncertain and did not provide for a definite or fixed term of employment. The plaintiff testified that:

"It was customary to continue a sailor in the occupation during the year until the close of navigation, if he is satisfactory."

Frank G. Root testified as follows:

"I am local manager for the Thompson Wrecking Association and live at Sault Ste. Marie. I have held that position since the spring of 1902. I have known Russell McPherson, of Detroit, since the spring of 1902, he worked for me. I sent him a telegram in June, 1912, asking him if he wanted to sail the tug Thompson, and if he did to wire me at once. We knew we would have to pay him $125 ($135) a month and his employment would last as long as we wanted to keep that tug in commission. * * * I would not say positively, but I think we kept that tug in commission until the last of November, or something like that."

Cross-examination:

"*Q.* Was Mr. McPherson's employment to be by the month?

"*A.* No, as long as we could keep the tug in operation and he give satisfaction.

"*Q.* As long as he gave satisfaction?

"*A.* As long as we wanted to use him.

"*Q.* Were you employing him as long as he was to give satisfaction?

Digitized by Google

"*A.* As long as we kept the tug in commission.
"*Q.* You also said you employed him as long as he gave satisfaction?
"*A.* He gave satisfaction, yes.
"*Q.* If he had reported to you on Monday, the 19th day of June, 1912, and had gone to work as captain, and during that week he had done something which you considered a breach of the rule for which you wanted to discharge him, could you have discharged him?
"*A.* I certainly could. We got a captain for the tug, I think, on the evening of the 17th, and he went to work that evening at 6 o'clock.
"*Q.* The wage of $135 per month was not payable in advance, was it?
"*A.* No.
"*Q.* The man had to complete four weeks' work before he was entitled to his $135?
"*A.* No, we paid them every two weeks.
"*Q.* You paid the men every second week?
"*A.* Yes, sir.
"*Q.* They had to complete two weeks before they were entitled to anything?
"*A.* If he wanted to leave us he could demand pay and we would have to pay him any time.
"*Q.* For the time he worked up to that time?
"*A.* Yes, sir.
"*Q.* Sometimes it happens that a man leaves the middle of the season to go to another position?
"*A.* The fellow left this boat and that is why I wanted to get Russell to take his place."

From the testimony of these two witnesses, it fairly appears that the contract which they had in mind was that plaintiff should be employed to sail the tug Thompson for the balance of the season at a salary of $135 per month if he gave satisfaction, with the privilege to the employer to discharge him for a violation of the rules, and with the privilege to the employee of leaving before the end of the season if he chose to do so. The chief point raised against this contract was that it was at the will of the employer, and therefore too uncertain upon which

Digitized by Google

to base an action of damages. We do not take this view of it. In the event that plaintiff gave satisfaction he was entitled to work during the balance of the season of navigation, which in the season of 1912 was about the first of December. Had the manager discharged the plaintiff for any reason except a violation of the rules, or because he was not satisfactory, his company would have been liable in damages therefor. The contract gave the employer the right to discharge him if he violated the rules; but we cannot assume that the plaintiff would have violated the rules, nor can we assume that he would have voluntarily left before the end of the term, it being an employment which he was anxious to secure. The salary was definite, the term of employment was definite, Root was desirous of employing plaintiff, and plaintiff was desirous of securing the position, and he testified that, if he had received the telegram in season, he would have accepted the position. We think a contract was contemplated which was sufficiently definite and certain in its terms to furnish a basis for recovery. For a case very similar on the facts and questions raised, see *Western Union Telegraph Co.* v. *Fenton*, 52 Ind. 1. See, also, *Robinson* v. *Telegraph Co.*, 169 Mich. 503 (135 N. W. 292).

Taking this view of the contemplated contract, it will be unnecessary to consider the other assignments of error.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

MARTINDALE *v.* LOBDELL-EMERY MANUFACTURING CO.

1. PRINCIPAL AND AGENT—CONTRACTS—AGENT'S AUTHORITY—LOGS AND LOGGING.

   Where plaintiff contracted with defendant to cut and haul logs at a specified price, agreeing to do the work according to instructions, evidence that defendant's woods superintendent, who had on previous occasions assumed to direct the performance of similar contracts with defendant's consent, instructed the plaintiff to deck the logs at an agreed extra compensation, immediate shipment being impossible because of a shortage of cars, the trial court was warranted in submitting to the jury the question of the extent of the agent's authority.

2. SAME—CONTRACTS—AGENT'S AUTHORITY—EXTRA COMPENSATION—PLEADING—INSTRUCTIONS.

   The court properly instructed the jury that plaintiff was entitled to recover, under the common counts, the value of the extra services performed, if they should determine that defendant's agent was acting within the scope of his authority in instructing plaintiff to perform them.

3. CONTRACTS—ORAL CONTRACT—STATUTE OF FRAUDS—WRITTEN CONTRACT—LOGS AND LOGGING.

   Where plaintiff sued to recover one-half of the scaler's wages, alleged to have been paid by him pursuant to an oral contract with defendant that each should pay one-half, positive testimony by plaintiff that said contract was made subsequent to the written contract, the record as a whole sustaining this contention, he was properly allowed to recover, notwithstanding defendant's denial of any such arrangement at any time.

4. SAME—LOGS AND LOGGING—BREACH OF CONTRACT—DAMAGES.

   Where defendant's logging contract gave it the right to stop the work if it was not being done properly and satisfactorily, and defendant stopped the cutting, claiming that plaintiff already had more logs cut than he could haul to the landing, in an action for damages for breach of contract and consequent loss of profits, the court properly instructed the jury that if an honest, fair-minded lumber-

Digitized by Google

man of ordinary intelligence, experience, and prudence would not have believed that the plaintiff, under the circumstances then existing, could haul the logs before the contract date expired, then plaintiff could not recover, but that if he had not been stopped he could have completed the contract of cutting and hauling, he could recover the difference between the contract price and the cost of putting in such logs as he could cut and haul.

Error to Montmorency; Emerick, J. Submitted June 25, 1915. (Docket No. 70.) Decided December 22, 1915.

Assumpsit by Grant E. Martindale against the Lobdell-Emery Manufacturing Company, a Michigan corporation, for damages for breach of contract. Judgment for plaintiff. Defendant brings error. Affirmed.

Henry, Henry & Henry, for appellant.

Elmer G. Smith (*Joseph H. Cobb*, of counsel), for appellee.

Originally the relations between the parties to this action were set forth in two separate contracts, as follows:

"This agreement, made and entered into this 15th day of July, A. D. 1911, by and between the Lobdell & Churchill Manufacturing Company of Onaway, Michigan, party of the first part, and Grant E. Martindale, of Onaway, Michigan, party of the second part, witnesseth:

"The second party agrees to lumber, cut, remove and deliver on the conditions and terms hereinafter mentioned, a part or all of the timber now growing, standing, lying and being on the following lands: Section 32, township 31 north, range 1 west, Otsego county, Michigan. * * *

"It is further understood and agreed that all of the timber is to be cut low on the stump and in the most economical manner for the saving of the timber, and from such portions of the section and in such kinds of

Digitized by Google

timber and in such quantities as the first party may direct from time to time.

"The second party further agrees that the work shall be done in a good workmanlike manner and that the instructions as to the manner in which this work shall be done shall be lived up to and carried out by the second party in all its details, and all the balance of the logs not specified above shall be cut in the standard lengths, from 8 to 16 feet.

"It is further understood and agreed that all logs are to be delivered free on board cars on the McGraw Branch of the Michigan Central Railroad, assorted as follows: All hemlock to be loaded by itself for distinct shipment. All basswood to be loaded by itself for distinct shipment. All elm to be loaded by itself for distinct shipment, if called for.

"An assortment in loading maple, beech and birch, if found necessary later by the first party.

"It is understood and agreed, further, that said party of the second part is to receive from the first party a price of $4.50 per M., log scale, and the official scale of the Michigan Central Railroad Co. shall be accepted as the final scale.

"It is understood and agreed, further, that the terms of settlement shall be as follows: Payment to be made to the party of the second part by the party of the first part on the 15th day of each month for all stock delivered during each previous month.

"The second party agrees to commence operation immediately and to commence shipping logs about the 5th or the 10th of August.

"And the second party further agrees and understands that should this work not be done satisfactorily to the first party, they, the first party, have the option of terminating this contract at any time.

"This contract shall be in force for so long a time as the work is done satisfactorily to the party of the first part, as stated above.

"By E. J. LOBDELL, President.
"G. E. MARTINDALE.

"Witnesses:
"G. E. TRIMM.
"M. E. CRUSE."

"Memorandum of agreement entered into this 9th day of September, A. D. 1912, between the Lobdell &

Digitized by Google

Churchill Manufacturing Company, of Onaway, Michigan, party of the first part, and Grant Martindale, of Onaway, Michigan, witnesseth:

"The said party of the second part is to log, cut, remove and clean all of the dead hemlock timber now lying, being, growing, or standing, which is marked and stamped to the boundaries on the outside of the burnt and dead wood timber on the following described land, which is included; hemlock timber blown over or lying flat throughout the lands as described herein. * * *

"Second party agrees to cut all of the above timber low on the stump and to take the trees and logs clean from the smallest to largest in exact accordance with instructions given by the Island Mill Lumber Company, of Alpena, Michigan. The same to be cut in as economical manner as possible by the first party and the second party agrees to cut the hardwood logs as far as possible into fifteen-foot lengths, all logs which will make clear and clean logs.

"The second party further agrees that all work shall be done in a good and workmanlike manner and to the entire satisfaction of the first party. It is fully understood and agreed between the first and second parties that should any part of this work not be properly done by the second party the first party has the right to stop the work and the second party agrees to vacate the premises at once without recourse, upon settlement being made for all work done in exact accordance with this contract and any timber which has been so cut by the second party not in exact accordance with the above instructions and contract, a reasonable price shall be deducted for cleaning up of said lands and for the work done in cutting such timber.

"It is further agreed that the delivery of all the above-mentioned timber and logs shall be made before April 1, 1913.

"The second party further agrees to furnish the first party with an accurate time sheet of men's names and time worked each week and a settlement shall be made for all labor performed on the premises delivering logs for the second party on the last Saturday of each and every month, and it is further agreed and understood that the party of the first part shall pay to the second

Digitized by Google

party for all logs delivered on the banks of the river at Rea's Landing and Hunt creek the sum of $4.00 per thousand feet, Scribner's rule, merchantable scale, and that payment shall be made for all work done the last Saturday of each and every month as follows: $2.50 shall be paid for all logs delivered or skidded and the roads made to them, and the balance of $1.50 is to be paid when the logs are delivered at Rea's Landing and Hunt creek.

"It is further understood and agreed that the second party shall have the balance of lumbering of hemlock timber on the above-described lands provided the prices for hemlock timber continue favorable and the railroad switch is put in to this timber, as talked and agreed to between the Boyne City, Gaylord & Alpena Railway Company.

"And it is further understood and agreed that the second party shall have the lumber, hard and soft wood timber, at such time as first party shall desire to have same delivered to be manufactured at Onaway, Michigan, into their various manufactured products.

"The above price is to include any decking that may be required.

"On each and every car loaded the second party is to furnish party of the first part with the number of each and every log on same.

"THE LOBDELL & CHURCHILL MFG. CO.,
"By E. J. LOBDELL, Pres.
"G. E. MARTINDALE.

"Witnesses:
"D. BERTRAND."

Prior to the execution of either contract the plaintiff had performed two or more lumbering contracts for the defendant under oral agreements. Before the first of the contracts in question was executed the plaintiff went over the ground to be lumbered with Mr. A. H. Blanchard, who was woods superintendent for the defendant company, and at whose request the first contract was made. Subsequently Mr. Lobdell, president of the defendant company, Mr. Blanchard, and the plaintiff met in the office of the defendant com-

Digitized by Google

pany where, after a conversation, the first contract was executed. Plaintiff seems to have immediately prepared for operations, and started the shipment of timber under the contract early in August, 1911. There is no doubt that it was contemplated between the parties that the operation should be carried on as a "hot-logging" operation. That is to say, it was expected that the trees would be cut down, immediately thereafter "swamped," "skidded," and hauled to the McGraw Branch for loading, where they were to be immediately loaded upon cars furnished by the railroad company for the purpose of transportation to Bay City, where the defendant had contracts of sale covering the product. From early in August to about the 8th day of January, the Michigan Central Railroad Company supplied sufficient cars to permit the operation to proceed under the "hot-logging" practice. From that time forward the cars were not furnished in adequate numbers by the railroad company. When this situation arose, the plaintiff and Mr. Blanchard, defendant's woods superintendent, went to Bay City, and there interviewed the railway officials for the purpose of securing adequate car service. This, however, they were unable to accomplish. Whereupon, it is undisputed on the record that Blanchard directed plaintiff to continue the operations and deck all logs at the branch where they were to be loaded, and where they should lie until cars should be furnished later. In carrying out these instructions, plaintiff built 1,000 feet of extra side track, and thereafter decked about 1,500,000 feet of logs. These were not all decked at the same time, plaintiff loading from day to day such cars as were furnished with logs as they came from the cutting grounds. For extra labor in building the side track and decking these logs plaintiff claimed the sum of $750, being 50 cents per thousand. The record dis-

Digitized by Google

closes that the value of the extra services performed in this behalf was from $1 to $1.50 per thousand, but plaintiff and Blanchard agreed that the compensation should be 50 cents per thousand. Blanchard, defendant's woods superintendent, as well as plaintiff, testified to this agreement. While defendant does not deny the making of this agreement between Blanchard and plaintiff, it does deny the authority of Blanchard to act as its agent and bind it.

A second controversy, arising under the first contract, involves the question of the payment of the wages of a scaler. The total amount paid by the plaintiff as the wages of a scaler was $700, one-half of which, $350, plaintiff claimed from defendant. Touching this item, it was the claim of the plaintiff that after the first contract was entered into it was agreed between himself and Mr. Blanchard, in the presence of Mr. Lobdell, who consented to the arrangement, that a scaler should be employed, mutually satisfactory to the parties, whose scale should be used as a check upon the scaler of the Michigan Central Railway, and that the wages of said scaler should be borne one-half by each party to the contract. This arrangement, testified to by plaintiff and Mr. Blanchard, was denied by Mr. Lobdell.

The third item of plaintiff's claim arises under the second contract, and grows out of the fact that on February 4th defendant ordered plaintiff to discontinue cutting on a portion of the so-called Montmorency contract. It is plaintiff's claim in this regard that he had built roads to the timber to be lumbered under the contract, and that he could have lumbered some 600,000 or 700,000 feet more timber had he not been unlawfully ordered to discontinue that operation. Plaintiff claims that by reason of defendant's unlawful act in ordering him to stop he lost a prospective profit of $1,200.

Digitized by Google

A second dispute arose between the parties growing out of the second contract. That contract provides:

"$2.50 shall be paid for all logs delivered or skidded and the roads made to them, and the balance of $1.50 is to be paid when the logs are delivered at Rea's Landing and Hunt creek."

Early in the performance of this contract a dispute arose between plaintiff and defendant as to the location of Rea's Landing. It was the contention of plaintiff that Rea's Landing was located upon the river about a mile and a half above Hunt creek, whereas the defendant claimed that it was located at a place called the "spout," very close to Hunt creek. Defendant held back a part of the contract price, thus compelling plaintiff to deliver the logs where defendant claims Rea's Landing was. This necessitated the watering and driving of the logs from the place where plaintiff had banked them on the river to the point claimed as Rea's Landing by defendant. For the extra services plaintiff demanded the sum of $500.00.

Plaintiff made four other claims against defendant under the two contracts, but as these were not submitted to the jury by the trial court, they may be disregarded.

Plaintiff's original bill of particulars was as follows:

1911-1912. Building 1,000 feet railroad track, clearing ground for decking and decking 1,500,000 feet logs at 50 cents per M.....	$750 00
1911-1912. Sorting 300,000 feet beech logs.....	50 00
1911-1912. ½ scaler's wages 14 mo. at $50.....	350 00
1911-1912. Delay caused by not having sufficient cars.....	250 00
1911-1912. Cutting 44,000 feet logs at $4.50 per M.....	198 00
1911-1912. Going over grounds a second time..	44 00

Later an amended bill was filed in which the following items were claimed:

Digitized by Google

Damage for profits on 6,000,000 feet hemlock at $2.00 per thousand	$1,200 00
Driving logs	500 00

Defendant pleaded the general issue, and gave notices of set-off and recoupment, the general tenor of which was that the plaintiff had carelessly and incompetently performed the contract to defendant's damage, the items of defendant's demand being as follows:

1912. To damages account of logs left undelivered under contract of September, 1912	$269 49
To improper cutting of logs, same being cut too long and too short	1,000 00
To balance of maple, beech and elm logs and standing trees left in woods on Otsego job	600 00
	$1,869 49

After an exhaustive trial of the issues so framed, plaintiff recovered a judgment in the sum of $1,580.42, which defendant now reviews in this court by writ of error.

BROOKE, C. J. (*after stating the facts*). The first item upon which the jury was permitted to pass was the sum of $750, the price agreed upon between Blanchard and plaintiff to be paid for the building of the 1,000 feet of side track, and the decking of the logs caused by the failure of the railroad company to furnish sufficient cars to permit plaintiff to conduct the operation after January 8th as a "hot-logging" proposition, which it is clear was the method of handling the job contemplated by the parties at the time the contract was made. As pointed out in the statement of facts, Blanchard, defendant's woods superintendent, testified to the fact of making the agreement for the extra compensation exactly in accordance with the claim of plaintiff. On behalf of defendant it

Digitized by Google

is urged that Blanchard was without authority, under the evidence, to modify the contract imposing an additional liability upon it. The contract provides:

"The second party further agrees that the work shall be done in a good workmanlike manner and that the instructions as to the manner in which this work shall be done shall be lived up to and carried out by the second party in all its details."

There can be no doubt under this section of the contract that the defendant, through its woods superintendent Blanchard, the contingency of the shortage of cars having arisen, ordered plaintiff to continue the operation and deck the logs at the siding. It should be borne in mind that the operation in question was being carried on in timber which had been injured by fire, and that it was necessary to have it cut and marketed speedily in order to prevent serious depreciation and loss. The authority of Blanchard to meet the exigency and to order a change in the method of the operation being unquestioned, it seems to us that plaintiff would have a clear right to recover the value of the extra services performed, under the common counts in his declaration, and under the uncontradicted testimony as to the value of such services contained in the record. Upon this question the court charged in part:

"And I charge you further, gentlemen, that if what Mr. Martindale claims for that service, that is to say, one-half dollar a thousand for 1,500,000 feet—if these services were fairly and reasonably worth that sum, he would be entitled to recover this sum of $750, which is his first claim in this case. Otherwise not.

"If you do not find that Mr. Blanchard had this authority, which I have spoken of, to oversee, supervise, manage, and control the outside operations in the woods of this concern, then Mr. Martindale hasn't a look-in on that claim. But if he had, then I charge you equally as the law that he had a right to make this

Digitized by Google

arrangement, which he says he made, to have Mr. Martindale put this excess of logs into these skidways and thereafter load them out. And if he promised that he should be paid for those services, then Mr. Martindale would be entitled to recover what those services—that is, the extra cost in loading out the skidded logs—what it was fairly and reasonably worth. He claims $750. It is for you to say whether he is entitled to that sum."

The first paragraph quoted above would seem to permit a recovery on the *quantum meruit*. The second predicates the plaintiff's right to recover upon the authority of Mr. Blanchard to fix the value of the extra services and bind his principal to pay the agreed sum. As indicated, we believe the first paragraph above quoted states the law applicable to the case, but we are further of the opinion that no error was committed by the court in submitting the question of Blanchard's agency to the jury under the testimony contained in the record. From Blanchard's testimony it fairly appears, we think, that he had, on various occasions during the period of his service with defendant, assumed to direct the performance of similar contracts, and that his principal, the defendant, had recognized his authority so to do. The testimony of plaintiff and Blanchard as to the method of doing business and as to the exercise of authority by Blanchard in this as well as in other similar contracts was, in our opinion, quite sufficient to carry to the jury the question as to whether Blanchard had authority to agree to pay the extra compensation. *Marx* v. *King*, 162 Mich. 258 (127 N. W. 341).

With reference to the second item of plaintiff's claim, one-half the scaler's wages, it seems to be defendant's contention that the oral agreement to divide the expense testified to by Blanchard and plaintiff was made prior to the execution of the written contract, which provides that:

Digitized by Google

"The official scale of the Michigan Central Railroad Company shall be accepted as final."

Plaintiff himself clearly testified that the arrangement was made subsequent to the execution of the contract, and we think a fair consideration of the entire record leads to the conclusion that the weight of the testimony is to that effect. Mr. Lobdell himself flatly denied the making of any such arrangement at any time.

As to the third item of plaintiff's damages arising from the closing down of the so-called Montmorency operation, defendant claims that it was acting within its legal rights in so doing in order to insure the delivery of all the logs then cut to the piling grounds designated in the contract before the snow should vanish in the spring. Counsel for defendant say:

"The defendant's position, for the reasons indicated above, and to insure the delivery of the logs already decked, was simply that Martindale should stop cutting any more timber until he had hauled this 1,500,000 feet which was decked, and that he should use his dray haul force in hastening the delivery of these sleigh haul logs."

Upon this point the learned trial judge instructed the jury as follows:

"If you find from the evidence, gentlemen, in this case, by a fair weight and preponderance, that if Grant Martindale had not been stopped by the defendant, that he could have hauled out his sleigh haul logs, and also could have cut and put in this quantity of dead hemlock which he was using for his dray haul; that if he had not been stopped he could have completed the job on both kinds of timber—then I charge you that he would be entitled to such damages as I shall instruct you in a few moments. But, on the other hand, gentlemen, and from the different standpoint, I charge you expressly that if an honest, fair-minded lumberman, of ordinary intelligence, experience, and prudence, would not have believed that the plaintiff,

Digitized by Google

under the circumstances then existing, could put his sleigh haul logs then on skids to the river before April 1, 1913, and also put in the remaining dray haul timber, and that the defendant did not so believe, then the defendant had the right to instruct the plaintiff to stop cutting dray haul logs and use his force to get all the logs ready cut to the river before cutting any more logs of either kind.

"Now, gentlemen, if under these instructions you find that the plaintiff would be entitled to recover damages for being prevented from continuing his operation in cutting and hauling the dray haul logs, I must tell you what you might award him. It is the claim of the plaintiff, and he has given evidence tending to show that state of facts, that before this time he had constructed all necessary or useful roads for the purpose of taking out the remaining standing, dead hemlock timber, standing and lying dead hemlock timber on section 28; that there was a quantity of that of about 600,000 feet; that he had built all necessary roads and landings; and that he could have done that work for $2 per thousand feet. The contract price was $4 a thousand, and he claims to recover, as the measure of damage, $2 a thousand, or the difference between the cost of putting in the logs and the contract price; and I charge you, gentlemen of the jury, that if you believe he is entitled to recover under these instructions which I have just stated to you and repeated, that that would be the measure of his damage. Not $2 necessarily—I do not say $2. It is for you to say, first, how much timber there was there that he could have put in before the 1st of April. Not just 600,000 because he says so, unless you are convinced from the evidence that that is true—but he could recover the difference between the cost of putting in such timber as he could and would have put in and the contract price. That would be the measure of damages."

This instruction we think correctly states the law applicable to the facts. *Atkinson* v. *Morse*, 63 Mich. 276 (29 N. W. 711).

The last item involves a pure question of fact, and

Digitized by Google

was submitted to the jury under appropriate instructions.

The judgment is affirmed.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

BROOKS *v.* PARKS.

1. WILLS—HUSBAND AND WIFE—HEIRS—DESCENT AND DISTRIBUTION—DEVISE TO CHILD, REMAINDER TO HEIRS.

   In a devise of property to one of the daughters of testatrix, remainder to her children, and the remaining property to another daughter, remainder to her heirs, and in the event of the death of the grandchildren or any of them, before the time for receiving his or her share, the same should pass to the brothers and sisters, to be equally divided between them, and in case all the children of one daughter should die their shares to go to the children of the other daughter, the word heirs as applied to the second daughter, should be understood as intending the legal heirs of the devisee.

2. SAME—WORDS AND PHRASES.

   In its legal and technical sense, the word heir is understood as designating the persons appointed by law to succeed in case of intestacy. Wherever the word is employed by a testatrix unaccompanied by qualifying or explanatory expressions, it must be allowed the meaning the law gives it and those only will come within the class thus described who would take under the intestate laws.

Digitized by Google

3. SAME—CONSTRUCTION.

A husband is the heir of his wife under the intestate statutes. By the provisions of the foregoing will, the husband of the second daughter mentioned in the will took one-half the estate left by his wife, their son having died before becoming seised of his share. The use of the word heirs as to the one daughter, and children as to the other, indicated the intent of the testatrix that the property should descend differently.

Appeal from Oakland; Smith, J. Submitted June 23, 1915. (Docket No. 69.) Decided December 22, 1915.

Bill by Eugene Brooks against Austin R. Parks and others for the construction of the will of Polly Robinson, deceased. From a decree for defendants, complainant appeals. Reversed.

Perry & Lynch (*John H. Patterson,* of counsel), for complainant.

Glenn C. Gillespie and *Andrew L. Moore,* for defendants Edgar A. Parks and Polly E. Bray.

BROOKE, C. J. Complainant files his bill of complaint in this cause for the purpose of securing a construction of the will of Polly Robinson, deceased. The will was made October 5, 1881, and admitted to probate March 4, 1889. At the time the will was made, and at the time of her death, the testatrix had two daughters, Anna E. Parks and Martha J. Brooks, and no other children. She had four grandchildren, all of whom survived—Austin R. Parks, Edgar A. Parks, and Polly E. Bray, children of Anna E. Parks, and Francis E. Brooks, the only child of Martha J. Brooks, and this complainant, her husband. Her daughter Anna E. Parks died February 26, 1903, and her daughter Martha J. Brooks died March 25, 1914. Francis E. Brooks, son of Martha J. Brooks, died before his

Digitized by Google

mother, on December 5, 1907. The other three grandchildren are still living and are defendants in this case. Complainant has acted as administrator of the estate, with the will annexed, for upwards of 20 years. Upon the death of Anna E. Parks in 1903, a partial distribution of the estate was had. Upon the death of Martha J. Brooks, in March, 1914, it became necessary to distribute the residue thereof, and the question arises as to how said residue shall be distributed.

The twelfth and thirteenth paragraphs of the will are as follows:

"12. After the legacies and bequests hereinbefore mentioned are disposed of, settled and paid, I give and bequeath all of the remainder of my personal and real estate which I now have or may hereafter acquire as follows, to wit: The use of one-half thereof I give and bequeath to my daughter, Anna E. Parks during her lifetime and after her decease I give and bequeath the said one-half of my said property to her children to be divided equally among them. I give and bequeath the use of the remaining half of all my said property to my daughter, Martha J. Brooks during her lifetime and after her decease I give and bequeath the said remaining half of my said property to her heirs.

"13. I hereby order and direct that in case of the death of any of my grandchildren before the time of receiving his or her share of my property as above specified, the share belonging to such deceased child or children shall belong to the brothers and sisters of such deceased child to be equally divided between them, and in case all of the children of one of my said daughters shall die before the time of receiving their share of said property then I order and direct that the said shares shall be given to the children of the other daughter to be equally divided between them."

Complainant shows that as administrator he has in his hands the sum of $18,098.58 to be distributed. He claims that under the final section of the twelfth clause of the will, he, being one of the heirs of Martha J. Brooks, is entitled to one-half of said sum. It is the

Digitized by Google

contention of the defendants, on the other hand, that the thirteenth clause limits the operation of the twelfth clause and clearly indicates an intention on the part of the testatrix to have the entire residue of the personal estate, devised by section 12, descend to her grandchildren, the children of one or the other of her daughters. From a decree sustaining this view, complainant has appealed.

In the late case of *Beck's Estate*, 225 Pa. 578 (74 Atl. 607), it is said:

"In its legal and technical sense the word 'heir' is understood as designating the persons appointed by law to succeed in case of intestacy, and, wherever the word occurs in a will unaccompanied by qualifying or explanatory expressions, it must be allowed the meaning the law gives it, and those only will come within the class thus described who would take under the intestate laws. And where qualifying expressions are relied on to give other than technical meaning, these must be so direct and unequivocal as to imperatively require such interpretation"—citing *Criswell's Appeal*, 41 Pa. 288, and *Eby's Appeal*, 50 Pa. 311.

In the case of *Gerard* v. *Ives*, 78 Conn. 485 (62 Atl. 607), the clause of the will under consideration was as follows:

"* * * One-fourth part to Henry White, Esq., of New Haven, in trust and confidence that he will annually pay over the rents, issues, interest, and profits thereof to Eunice Louise Beecher, wife of George H. Beecher, my niece, during her natural life; and then and after her decease, I give, devise, and bequeath the said fourth part to her lawful heirs forever."

The court there said:

"The plaintiff claims that the words 'her lawful heirs,' as used in the above quotation, should be held to mean either 'children' of Mrs. Beecher, or the lawful heirs of Mrs. Beecher, living at the death of Mrs. Maltby (the testatrix). This claim is not tenable. In its primary and technical meaning in our law, the

Digitized by Google

word 'heirs' is used to express the relation of persons to some deceased ancestor; and when it is used in a will, as here, to point out legatees or devisees, its primary legal meaning should be given to it unless it is clearly shown by legitimate evidence that the testator used it in a different sense. This is the settled rule of construction in this State"—citing *Gold* v. *Judson*, 21 Conn. 616; *Rand* v. *Butler*, 48 Conn. 293; *Leake* v. *Watson*, 60 Conn. 498 (21 Atl. 1075); *Ruggles* v. *Randall*, 70 Conn. 44 (38 Atl. 885).

In the case of *Smith* v. *Winsor*, 239 Ill. 567 (88 N. E. 482), it is held that the word "heirs" in a will may mean children, and it may mean some other class of heirs, not including all, where the context of the entire will plainly shows such purpose.

That the complainant under the laws of this State was an heir to his wife, Martha J. Brooks, is not open to question. *Lyons* v. *Yerex*, 100 Mich. 214 (58 N. W. 1112, 43 Am. St. Rep. 452); *Turner* v. *Burr*, 141 Mich. 106 (104 N. W. 379); and *Menard* v. *Campbell*, 180 Mich. 583 (147 N. W. 556). As such heir, there being no children, complainant would inherit one-half of the estate left by his wife. Act No. 331, Pub. Acts 1905, and Act No. 286, Pub. Acts 1909.

The fact that Martha J. Brooks possessed only a life interest in the property devised is of no consequence. Complainant, as to the property in question, does not inherit from his wife. He is entitled to take simply because he is designated in the will of the testatrix as one to whom the property shall go upon the expiration of the life estate. It is strongly urged on behalf of defendants that a contrary intention on the part of the testatrix is to be gathered from a consideration of the whole instrument. With this view we are unable to agree. The fact that the testatrix in the same clause devised the remainder in one-half to the children of her daughter Anna E. Parks, and the remainder in the other one-half to the heirs of her daughter Martha

Digitized by Google

J. Brooks, in our opinion, clearly indicates an intention upon her part to have the several remainders descend differently. Her determination to so dispose of the remainders may have been induced by the fact that, while her daughter Anna E. Parks had three children, her daughter Martha J. Brooks had but one child.

Nor do we think the language of the thirteenth clause modifies that contained in the twelfth clause. In effect, that clause provides that, upon the death of any of the grandchildren, his or her share of the property "as above specified" shall be disposed of among the other children. The words "as above specified" clearly refer to foregoing provisions of the will, and, so far as it affects the question under consideration, to section 12 of the will. What share "as above specified" would go to Francis E. Brooks, the only child of Martha J. Brooks? Had he outlived his mother, the question then would have arisen between himself and his father, both of whom would have been heirs of Martha J. Brooks and entitled to take the remainder under the plain language of the closing lines of section twelve. Francis E. Brooks having predeceased his mother, his share "as above specified" must go to his cousins, the defendants herein. But his father, the complainant, coming within the designation as an heir of Martha J. Brooks, is entitled to his distributive share under the language of the section under consideration.

The decree of the court below is reversed, and a decree will be entered in this court upon the footings of this opinion.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

CULLEY *v.* CULLEY.

1. DIVORCE—CRUELTY—EVIDENCE.
   Testimony pro and con in a suit for divorce tending to show a miserly disposition on the part of the husband, and harsh or cruel treatment, *held*, to warrant a decree for the complainant wife.

2. SAME—PRESUMPTIONS—WITNESSES.
   Where the questions involved in a suit for divorce are questions of fact and the witnesses are greatly at variance as to the circumstances, the opportunity to observe their bearing and manner upon the witness stand is of great importance, and before reversing a decree the Supreme Court must be fully persuaded that it would necessarily have reached a different conclusion had it occupied the position of the court appealed from and been favored with all the advantages of that court for judging rightly.

Appeal from Jackson; Parkinson, J. Submitted June 8, 1915. (Docket No. 1.) Decided December 22, 1915.

Bill by Estella Culley against James Culley for divorce. From a decree for complainant, defendant appeals. Affirmed.

Forrest C. Badgley and *James J. Noon*, for complainant.

Wilson & Cobb, for defendant.

PERSON, J. The parties to this suit for divorce were married in the year 1886, and have one child, a son, who was about 23 years old when the bill of complaint was filed. The defendant is a farmer, and owned a small farm at the time of the marriage. Since then he has several times exchanged farms, or sold and purchased anew, each time getting a larger and better one,

Digitized by Google

until he now owns upwards of 200 acres, and has considerable personal property, with money in the bank.

The charges against the defendant, made by the wife in her bill of complaint, are, in substance, that he yet is, and ever has been, miserly in his conduct; that he has refused, or failed, to properly furnish her with the conveniences of life; that he has caused her to work beyond her strength, and that he has treated her otherwise in a harsh and cruel manner. She avers that he has never furnished her with more than one dollar in money since their marriage, and, as further illustrating the character of his treatment, that he has never bought for her any article of clothing, except upon one occasion when he brought her a second-hand pair of shoes that had cost him 50 cents. She also alleges that at various times he has called her "a damned bitch;" and that, prior to her leaving him, he had not spoken to her during a period of about 3 years.

In his answer the defendant either explicitly denies each charge made by complainant, or makes an explanation showing that the fault was with her. He avers that he not only gave to the complainant money from time to time, but that she had the privilege of purchasing what she wished upon his credit. He charges that she has not only been insolent and insulting in her talk and conduct, but vulgar in her language and actions for the purpose of annoying and humiliating him; and that for years she has neglected her home and absented herself therefrom at times when her services were the most needed; and he closes his answer with the statement:

"That he has for years been insulted, imposed upon and abused by the complainant, all of which he has borne without complaint, avoiding, so far as he was able to do so, everything calculated to arouse her disposition."

A considerable time was occupied by the hearing,

Digitized by Google

and a large amount of testimony was taken. The circuit judge filed a lengthy opinion, in which he stated in detail his findings of fact, and his reasons therefor. The complainant was given a decree of divorce with alimony, and the defendant appeals to this court.

It is very evident that the contradictory testimony of the parties goes, either upon the one side or the other, or upon both sides, beyond mere mistake, or exaggeration. It is not possible that the particular allegations and denials can all be the result of merely faulty memories. But out of the matters in dispute we think that certain facts are established.

The defendant is undoubtedly of a very close and miserly disposition. He testified:

"When I was around to my work my clothes would get ragged; didn't pay attention to them. When they wore out so they couldn't stay on I would put on some more, and kept right on working. I haven't bought so very many clothes. The suit I have got on now I have had about 12 years. It isn't worn out."

The court inquired about his recipe for making clothes last, and his answer was:

"Don't put them on, and you won't wear them out."

And when asked where he got the overcoat he was then wearing, he said:

"I got it of Fred Gilman; bought it second-hand. I gave him $4 for it. This makes the third winter I have worn it."

This economy by defendant in the matter of his own wearing apparel is not referred to as constituting a serious offense, although the wife complains that it was a source of humiliation to her. A proper economy is always a virtue. But there is some ground for inferring that the disposition of mind which has led defendant to such excessive saving in the matter of his own clothing, has very likely also led him to demand the

Digitized by Google

same economy from his wife and child, not only as to their clothing, but in all other things. It lends some countenance to the wife's charges.

She testifies:

"I told him he would have to get the groceries. I would have to go to the store for them, and I went to Thomas Pulver and told him when he wanted his pay he would have to notify Mr. Culley. I told defendant the groceries were being bought at Pulver's and he would have to pay for them. He said he would not pay for the groceries. I could get groceries the best way I could. He had no money to pay for groceries. To get them with my own money. I told him I had no money to get them with. I continued to buy groceries on credit; had them charged to defendant."

The defendant admits that there was some trouble over the groceries. He says:

"She hadn't said anything to me about buying goods at Pulver's store before going there. I first heard of it by Pulver's notifying me. Wrote me saying there was a bill or account there. I had never heard of it. I talked with her about it. Said I thought it was a poor way for her to run an account down there and I would rather pay for things as I went along. She said she was going to have groceries and I would have to pay for them and I did."

He claims that he was always willing to furnish groceries and to pay for them, but we are satisfied that there must have been grounds for the wife's complaint in this respect. These seems to be no apparent reason why she should have bought groceries on credit, against his objection, if he was willing to, and did, furnish money for that purpose. He says that he paid for the groceries which she bought on credit, because he supposed he had to.

He admits that he and complainant went for a long period of time without speaking with each other; and there was more than one such period of silence. He says that he refrained from talking to her, because

Digitized by Google

she would not talk with him. A Mrs. Morton testifies that she worked in defendant's family for about 15 weeks at one time when the complainant was ill in bed and under the doctor's care; and this witness says that the defendant never went into complainant's room during the entire period, nor made any inquiry as to complainant's condition. We are led to believe that the complainant had grounds for complaining of cruel treatment.

We have mentioned but few of the many charges and countercharges made by the parties on the witness stand, and have not attempted to state the results of the proofs in full. The complainant unquestionably had her faults, and was not without blame. We are satisfied, however, that the greater fault was with the defendant, and that his indifference, not only to his wife's comfort, but to her rights, was largely the cause of such conduct on her part as he complains of, so far as it took place. He says that he is in doubt whether her mind is right at all times. If he is in good faith about this, it makes his course all the more questionable and should excuse many of the things charged against her, if those things really occurred.

We cannot help but attach considerable importance to the testimony of the son. In many things he corroborates the testimony of the mother. He was subjected to a severe cross-examination, which led him into some inconsistencies; but, upon the whole, we are impressed with the belief that he intended to be truthful and fair.

The letters written by complainant are not to be justified, but we look upon them more as the utterances of an excited woman, trying to counteract what she believed were unfair methods on the part of the defendant, than as any attempt to tamper with witnesses. Taking the whole record together, they should not bar her right to relief.

In cases of this kind, where the questions before the

Digitized by Google

court are almost entirely as to the facts, and where the witnesses are so greatly at variance as to what has occurred, the opportunity to observe their bearing and manner upon the witness stand is very important, and, before reversing a decree, "the appellate tribunal ought to be fully persuaded that it must have reached a different conclusion had it occupied the position of the court appealed from and been favored with all the advantages of that court for judging rightly." In this case we are satisfied that the circuit judge came to the right conclusion as to its important features.

The decree is affirmed, with costs to the complainant, including a solicitor's fee of $100.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This case having been submitted on briefs, without oral argument, was reassigned after the death of Justice MCALVAY.

FERLE v. CITY OF LANSING.

1. MUNICIPAL CORPORATIONS — CONTRACT — OFFICIALS — FRAUD — LANSING CHARTER.

   Under the provisions of the charter of the city of Lansing, which prohibits any member of the city council from holding any office or position, or receiving any employment directly or indirectly connected with the government, and forbids any member of the council or person holding any elective or appointive office from being interested in any contract with the city, under a penalty of fine or imprisonment, a purchase of lumber by the board of public works

Digitized by Google

from a corporation in which a member of the police and fire commission was a stockholder, vice president and manager, was invalid and justified the lower court in entering a decree in chancery enjoining the payment of the price.

2. SAME—CONTRACTS—CORPORATIONS.
Such transaction is not analogous to the furnishing of light and water to city officials and members of the council, which is in the nature of a privilege open to all the citizens or of a common benefit available upon an equality of terms.

3. SAME—SALES—CONSTRUCTION.
The prohibition of the charter prevents the city from making purchases of a corporation of which any officer of the city or member of the council is an officer or stockholder, a sale being a form of contract intended to be prohibited.

4. SAME.
Although the charter provisions do not in terms make the contract or sale void, the imposition of the penalty has by implication a like effect.

5. SAME—PUBLIC POLICY.
A contract made void by the charter or by statute is incapable of ratification nor can a recovery upon it be permitted; the courts will leave the parties where it finds them.

6. SAME.
And want of knowledge by the officer, of the execution or existence of the contract, is not conclusive; it is unenforceable whether he helped to procure it or not.

Appeal from Ingham; Wiest, J. Submitted October 18, 1915. (Docket No. 151.) Decided December 22, 1915.

Bill by Jacob Ferle against the city of Lansing and others for an injunction restraining the defendant city from paying a lumber bill. From a decree for complainant, defendant Rikerd Lumber Company appeals. Affirmed.

Digitized by Google

Jason E. Nichols, for complainant.

Joseph H. Dunnebacke, for defendant city of Lansing.

Warner, Raudabaugh & Person and *C. W. & W. S. Foster,* for defendant Rikerd Lumber Co.

BROOKE, C. J. The present charter of the city of Lansing, adopted by the electors in 1912, contains the following provision:

"Sec. 53. No member of the city council shall, during the period for which he was elected, be elected or appointed to, or be competent to hold any office or position or receive any employment directly or indirectly connected with the government. No member of the city council nor any person holding any elective or appointive office under the city government shall be interested in any contract with the city, or be a bondsman or surety on any contract or bond given to the city. Any member of the city council or other officer violating the provisions of this section shall, upon conviction thereof, be fined not less than one hundred nor more than five hundred dollars, or be imprisoned for not less than thirty days nor more than one year, or both such fine and imprisonment within the discretion of the court. The conviction of any alderman or official under this section shall operate in itself to forfeit his office."

This suit is brought to enjoin the payment of a bill of $140.62 for lumber sold and delivered to the city by the Rikerd Lumber Company, a domestic corporation. It is the theory of the bill of complaint that the sale of the lumber was in violation of the charter provision, inasmuch as Hiram W. Rikerd, a stockholder of the lumber company and its vice president and manager, was also, at the time of the sale, an officer of the city, namely, a member of its board of police and fire commissioners. The lumber was purchased for the city by its superintendent of public works, and the purchase was made of an employee of the lumber com-

Digitized by Google

pany without the personal knowledge of Mr. Rikerd, who was also unaware of its delivery to the city. The board of police and fire commissioners did not, nor did any of its members, have any official connection with the purchase; their department being entirely distinct and separate from the department of public works. It is conceded that the lumber was sold at a lower price than it could have been purchased for elsewhere. When the bill came before the common council of the city, complainant, who is a member thereof, as well as a taxpayer of the city, protested against its consideration; but a majority of the council thought otherwise, and voted that it be allowed. Thereupon this suit was begun, and was heard upon bill and answer, the facts being conceded. In the circuit court a decree was entered declaring the transaction void, and perpetually enjoining payment for the lumber. The city attorney files a brief asking that the decree be affirmed.

The first question discussed by counsel is whether, under this charter, one department of the city government may make purchases of a corporation when an officer in another and distinct department is also an officer or a stockholder, or both, of such selling corporation. The determination of this question does not depend upon the rules of public policy alone, as developed and applied by the courts in the absence of a controlling statute. The provision of the charter is broader than those rules, as usually applied; and, while both are founded upon the same general principles, the charter itself is the declaration of the public policy of the city. By its terms it prohibits every contract made by the city, in which any officer thereof, or member of its common council, has a private interest, and it is immaterial whether such official, or his department, has any part in the making of the contract, or could have. The electors had a right to include such a provision in their charter, and it should not and cannot be nar-

Digitized by Google

rowed by judicial construction. Provisions as broad are not uncommon in statutes and in the charters of municipalities, and their increasing breadth and scope come from experience, and a conviction that purity of government must be carefully maintained. It is urged that so sweeping a prohibition, if construed according to its terms, will operate to deter business men from accepting office. This is an argument to be addressed to the electors themselves, rather than to the courts; but the electors undoubtedly believed that enough good men could be found to administer the government of the city after excluding those who expected or desired contracts with it. It is also argued that such construction of the charter will prevent city officials and members of its council from taking their water supply and electric lighting from the city. But this is not so. While the relation between the city and the consumer of water and lighting furnished by it is a contract relation, it is more in the nature of a common benefit or privilege, open to all citizens upon the same terms, and not within the meaning or purpose of the charter prohibition.

It is true that this prohibition in the charter prevents the city from making purchases of a corporation of which any officer of the city, or member of its council, is an officer or stockholder. This was determined, on principle, in *Consolidated Coal Co.* v. *Board of Trustees*, 164 Mich. 235 (129 N. W. 193). A sale is a contract, and a form of contract in which the evil sought to be remedied by the charter is most frequently apparent. And, as said in *Hardy* v. *Mayor and Council of Gainesville*, 121 Ga. 327 (48 S. E. 921):

"A stockholder in a private corporation clearly has an interest in its contracts; and if the city cannot make a contract with the officer himself, it cannot make it with a corporation in which such officer is a stockholder."

Digitized by Google

The charter does not, in so many words, say that a contract made by the city shall be void if any member of the council or city official is interested in it; but it is void, nevertheless, inasmuch as the charter imposes a penalty for the making of such a contract.

"A statute which imposes a penalty upon an act by implication ordinarily prohibits such act. A penalty usually implies a prohibition, although there are no prohibitory words in the statute." Elliott on Contracts, § 666.

See, also, *In re Reidy's Estate*, 164 Mich. 167 (129 N. W. 196); *Case* v. *Johnson*, 91 Ind. 477; Bishop on Contracts (2d Ed.), § 471; Dillon on Municipal Corporations (5th Ed.), § 773, and cases cited.

And a contract made void by charter or by statute cannot be ratified—there is nothing to ratify—nor can any recovery be had upon it. The courts will leave the parties as it finds them; and if it is a contract of sale, an action cannot be maintained for the value of goods delivered under it. *Consolidated Coal Co.* v. *Board of Trustees, supra; Milford Borough* v. *Water Co.*, 124 Pa. 610 (17 Atl. 185, 3 L. R. A. 122); *Berka* v. *Woodward*, 125 Cal. 119 (57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31); *City of Ensley* v. *Hollingsworth & Co.*, 170 Ala. 396 (54 South. 95); *Nunemacher* v. *City of Louisville*, 98 Ky. 334 (32 S. W. 1091). Nor will the courts inquire whether the terms of the contract are fair or unfair. The purpose of the prohibition is not only to prevent fraud, but to cut off the opportunity for practicing it.

There can be no doubt that Mr. Rikerd was an officer of the city. The board of police and fire commissioners, in exercising control over the police and fire departments of the city, is performing very important governmental functions. And the fact that Mr. Rikerd cannot be charged personally with having violated the charter, inasmuch as he had no knowledge of the sale

Digitized by Google

or delivery of the lumber, does not determine the case. Every contract with the city is made void when a member of the common council or an officer of the city has an interest in it, whether such member of the council or city official has or has not, himself, been guilty of procuring the contract.

The decree is affirmed, with costs to the complainant.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

In re WIGENT'S ESTATE.

PARMALEE *v.* WIGENT'S ESTATE.

1. ESTATES OF DECEDENTS—SERVICES—EVIDENCE—VALUE—EXPERT OR OPINION TESTIMONY.

   In a suit by one claiming to have performed services for decedent, opinion evidence to prove the value of claimant's services was improperly rejected by the trial court; its weight was for the jury.

2. SAME—NOTE—EVIDENCE.

   It was also improper to receive in evidence a note for $25 that claimant had given to decedent and that had been adjusted by the commissioners on claims and offered in evidence by defendant not as a set-off but for other purposes.

3. SAME—IMPLIED CONTRACT—QUANTUM MERUIT.

   Where there was no evidence of an express contract entered into by and between decedent and her cousin, who cared for the latter in her last years, to pay for the services, for which he presented his claim against her estate, the trial court committed reversible error in not instructing

Digitized by Google

the jury that a contract to pay therefor might be implied from the fact that the services were rendered by claimant and accepted by the decedent. Because of the remote relationship between decedent and the claimant, no presumption arose that the services were rendered gratuitously.

Error to Berrien; Bridgman, J. Submitted June 22, 1915. (Docket No. 97.) Decided December 22, 1915.

Albert F. Parmalee presented his claim for services against the estate of Fidelia Wigent, deceased, which was not allowed by the commissioners on claims, and claimant appealed to the circuit court. Judgment for defendant of no cause of action. Claimant brings error. Reversed.

John J. Sterling, for appellant.

Gore & Harvey, for appellee.

On October 31, 1912, one Fidelia Wigent of Watervliet, Mich., died testate. At the time of her death she was a little over 76 years of age. During the last 2 years of her life she had not enjoyed the best of health, and it was necessary that some one stay with her. In February, 1911, the plaintiff, a cousin of the deceased, and a man at that time about 70 years of age, commenced to live at the house of the deceased. It is nowhere conclusively shown in the record that he was invited to stay there, though such invitation may be inferred from the fact that he remained there until the death of Mrs. Wigent. While there he looked after the deceased as occasion required, and assisted as best he could with the household duties. During the 91 weeks prior to the death of Mrs. Wigent, the plaintiff was at the house continuously except on Friday afternoons and Saturdays, when he went to Hartford to work at his profession as an optician.

Digitized by Google

Upon her death the estate of Fidelia Wigent was admitted to probate, and commissioners of claims appointed. No provision having been made in her will for compensation for the services rendered by the plaintiff, he presented his claim to said commissioners in the sum of $637, that amount being $1 per day for the time he had been living at her house. The claim was not allowed by the commissioners, and an appeal was taken to the circuit court. Upon the trial in that court a verdict of no cause of action was rendered. Plaintiff now reviews his case in this court by writ of error.

There are some 20 assignments of error which, in substance, may be classified as follows:

(1) Error upon the refusal of the court to permit plaintiff to testify to matters equally within the knowledge of the deceased.

(2) Refusal of the court to permit plaintiff and his witnesses to testify as to the value of the services rendered.

(3) Error of the court in admitting a promissory note given by plaintiff to deceased.

(4) Refusal of court to permit witness Burnside to relate conversation he had with plaintiff.

(5) Errors assigned upon the charge of the court as given.

BROOKE, C. J. (*after stating the facts*). It will be unnecessary to notice in detail each assignment of error. The first, we think, is without merit.

The assignments referred to in the second class above set forth are, in part at least, well taken. We can perceive no reason why the plaintiff should not have been permitted to give testimony as to what he considered his services to be worth. Nor is there any reason why his witnesses, after having qualified by showing their knowledge of what he did, should not have been permitted to give their several opinions as to the value of such services. The admissibility of such

Digitized by Google

testimony is clear. Its probative force rests with the jury.

The third assignment of error is based upon the ruling of the court admitting in evidence a promissory note for $25 made by the claimant in favor of the decedent, which had been adjusted by the commissioners on claims. In tendering it in evidence, counsel for the estate said:

"I offer this in evidence. I do not offer that as an offset against this claim, but I offer it for other purposes."

Counsel for plaintiff objected to it, saying:

"We object to that on the ground that it is immaterial, irrelevant, and incompetent for any purpose. That they do not offer it as an offset against our claim, and it has been taken care of before the commissioners on claims.

"The Court: I don't know that.

"Mr. Sterling: The record is here to show it.

"The Court: I see where it may be relevant.

"Mr. Sterling: The same matter relative to the things he purchased or that we claim he purchased.

"The Court: The objection is overruled."

Whereupon the note was received in evidence. We are of opinion that the admission in evidence of this note was erroneous, although perhaps it cannot be said that it was prejudicial. However, upon the new trial we think it should be excluded.

The principal ground for reversal is based upon the voluntary charge of the court. That charge was in part as follows:

"Before the plaintiff, or rather the claimant, can recover there must be shown to you an agreement between the parties that this claimant was to be paid for his services, and there must be evidence that the services were to be paid for by the decedent. Not necessarily perhaps evidence that they came together and made a formal, what we call a formal agreement, but you must find there was an agreement that this woman was to pay this man for his services either, as the law

Digitized by Google

says, an express or an implied agreement, and your verdict or your judgment must be based upon the evidence actually in the case as you have heard it here in the court. And you must further be able to find from the evidence what services plaintiff performed, and the value of such services actually performed by him and under all the evidence and circumstances in the case that there was an arrangement or agreement that he should be so paid.

"On the other hand, the defendant estate, so near as I can gather, claims that he lived there, perhaps had his board, with the understanding that all services that he rendered were to be gratuitous, that is, that he would not be paid for his services, and that the services so rendered were purely voluntary.

"Now no one is bound to pay for volunteer services rendered under such circumstances which do not fairly indicate an expectation of reward.

"Now, if whatever services this gentleman, claimant, rendered, if any were rendered, were done and performed under circumstances justifying the belief that no charge was intended to be made there was no liability to pay. And if the relations of the parties, the nature of the services, and all the pertinent facts show that the plaintiff was not working for money, that there was no expectation of being paid, the plaintiff cannot recover. And it is necessary for a plaintiff in a suit of this kind to establish everything necessary to a recovery, that the plaintiff must show his right to recover by a fair preponderance of the evidence, must show the work that he did and its value, and to show what understanding the defendant had of the matter, and that she received a benefit of it.

"The matter is for you gentlemen to decide under the rules as I have given them to you. If you find that the claimant is entitled to recover you can allow such amount as in your judgment the services that he rendered were actually worth. If you find there was no agreement and that the claimant did not intend to charge, your verdict will be against the claimant, that is, you find for the estate."

After retiring for a time, the jury returned to court, when the following occurred:

Digitized by Google

"*The Court:* Gentlemen, I am advised that you wish the advice of the court upon some matters if it is a question of law.

"*A Juror:* Yes, sir.

"*The Court:* Have you agreed upon a verdict?

"*A Juror:* No; we have not agreed on a verdict. There is a little question, your honor, that we are undecided on and we wish a little instruction from you. The question is that: Can other evidence of an understanding or contract than written or verbal be considered by the jury in determining the claim? The second is: May an implied agreement be considered by the jury?

"*The Court:* Upon that point you are to take all the facts and circumstances, the facts that appear in court before you, and from all those facts and circumstances determine whether there was or was not an implied agreement. Is that sufficient? You may take all the facts and circumstances. You may determine whether there was or was not an implied agreement.

"*A Juror:* It is not necessary that the contract be a written or verbal contract?

"*The Court:* That is a little difficult to answer. It is not necessary it should be a written contract, but there must have been an agreement between the parties, as I stated in my suggestion to you this morning; there must have been an agreement between the parties. There was no agreement in writing. Therefore it must have been verbal, but you have the right to determine whether or not there was such an agreement —implied agreement—by considering all the facts and circumstances, and the testimony, and you must determine, as I said before, what substantially that agreement would be, and that you find what the man did, and what he agreed to do, and what substantially that implied agreement would mean."

We are of opinion that this charge, taken as a whole, is properly subject to criticism. While the evidence fails to disclose an express verbal contract between the claimant and the decedent, under the authorities in this State, it is clear that such a contract may be presumed from the fact that the services were rendered by the claimant and were accepted by the de-

Digitized by Google

cedent. In the early case of *Sword* v. *Keith*, 31 Mich. 247, at page 257, Mr. Justice CHRISTIANCY, speaking for the court, said:

"It is objected that there was no evidence tending to show any such promise on the part of Keith. For myself, I am inclined to think this objection well founded; but my brethren take a different view, and think the circumstances shown would authorize the inference that both parties acted upon the understanding that such services would continue to be rendered by Keith, and that this would be equivalent to a promise; and it cannot be denied that there is some force in this view of the case."

In the case of *In re Williams' Estate*, 106 Mich. 490 (64 N. W. 490), it is said:

"Under all the facts and circumstances, the jury were justified in concluding that the services were performed in reliance upon the contract, and were accepted in recognition thereof. The proof does not rest alone in parol, but upon the subsequent conduct of the parties as well—performance on the one part, and acceptance on the other."

See, also, *Sammon* v. *Wood*, 107 Mich. 506 (65 N. W. 529), and *In re Abel's Estate*, 173 Mich. 93 (138 N. W. 325), where Mr. Justice STONE, speaking for the court, said:

"It is not essential to a recovery by a child for services rendered to a parent that a formal contract be established in relation thereto; but if the facts and circumstances attending the performance of the work and in its acceptance are sufficient to rebut the presumption that the services were gratuitous, and to authorize the inference that both parties acted under the understanding that they were to be paid for, the parent is liable."

In all these cases the services were rendered by a child for a parent, where a presumption arises that the services were rendered gratuitously. No such presumption arises in the case at bar, because of the re-

Digitized by Google

mote relationship between the claimant and the decedent. It is, of course, possible that the claimant rendered the services in question gratuitously. A careful examination of the record, however, fails to disclose any testimony bearing out this view.

The judgment is reversed, and a new trial ordered.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

CLINE *v.* STUDEBAKER CORPORATION.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EVIDENCE—LOSS OF EYE.

   In a proceeding under the workmen's compensation act for compensation to a servant of an automobile company for the loss of part of the sight in claimant's right eye, evidence that the cause was a gonorrheal infection after getting a piece of steel in the eye, that the employee had not been affected with the disease, and that an attempt had been made to remove the steel by a fellow workman in the factory, by rolling back the eyelid on a match, that another employee removed the same, and that the eye was normal before the injury, *held*, to support the finding of facts of the Industrial Accident Board that the accident arose out of, or in the course of, his employment.

2. SAME—COMPENSATION FOR PARTIAL LOSS OF EYE.

   However, for the partial loss of the sight of claimant's eye, which could be minimized by the use of glasses, so that no diminution of earnings took place, and no impairment

Digitized by Google

of his earning capacity appeared from the testimony, the board was not authorized to award compensation (section 10, Act No. 10, Extra Session 1912), though without glasses he had only ten per cent. of normal vision but fifty per cent. with them.

Certiorari to the Industrial Accident Board. Submitted April 16, 1915. (Docket No. 146.) Decided December 22, 1915.

Proceedings by Clarence L. Cline, under the workmen's compensation act, against the Studebaker Corporation and another for the partial loss of an eye. From the award entered, said corporation brings certiorari. Reversed.

William D. Ellsworth, for claimant.

Frederick J. Ward, for defendants.

PERSON, J. It is claimed in this case that the appellee was injured while working for the defendant manufacturing company, and that the result of such injury was the loss of his right eye. The insurance company carrying the risk and the injured employee entered into an agreement about a month later regarding compensation, of which the material part reads as follows:

"On the 2d day of March, 1913, about 5 o'clock in the morning, the injured was working on a rear axle with another employee. A piece of steel flew and struck injured in the eye. A gonorrheal infection set in, and the injured was obliged to quit work on the morning of March 4, 1913.

"The terms of the agreement follow: It is mutually agreed by and between the parties hereto that the average weekly wage of the injured at the time of the accident was $15 per week, and that the injured is to receive as compensation herein the sum of $7.50 per week, as provided for by the Michigan compensation act."

Digitized by Google

This agreement was approved by the Industrial Accident Board, whereupon the insurance company paid to the appellee $66.25, and received his receipt as for a full settlement of compensation, subject, however, to the approval of the board. Subsequently, and on the 25th day of October, 1913, the appellee applied for further compensation, and a committee of arbitration was appointed, which decided that he was entitled to the sum of $7.50 per week for 100 weeks from date of the accident. The committee also found that there was due to the appellee at the time of their report the sum of $321.50, less the $66 already paid. Upon appeal to the Industrial Accident Board this decision of the committee of arbitration was affirmed, the board returning the following findings of fact:

"The infection which destroyed the sight of the eye is not reasonably accounted for, except as coming through or resulting from the accident; the applicant himself being free from the disease. The infection may have come from the hands of Mr. Rood when he tried to roll the eyelid back with a match, or from the hands of the nightwatchman when he took a piece of steel from the eye. The eye was normal before the injury, and the inflammation which directly followed the injury caused the damage to the eye."

The objections to the award argued in this court will be considered in their order:

1. That the loss of sight should not be attributed to the accident, but to a disease not in any way connected with the employment.

The fact that a piece of steel flew into claimant's eye in the course of his employment seems fairly well established. His testimony is to that effect, and it is corroborated by his fellow workmen. But it is not shown that this flake of steel directly caused the subsequent impairment of vision; that, on the contrary, must be attributed to the gonorrheal infection. Such is the finding of the board, and the finding is in ac-

Digitized by Google

cordance with the agreement between the parties. Nor is it probable, from the testimony of the doctors, that the germ which caused the infection was upon the steel itself. They state, however, that such a germ might get into the eye from a towel, from washing utensils, from the straps or rails of a street car, and in similar ways.

The burden is therefore, as insisted by counsel for defendants, upon the claimant to show by a preponderance of evidence that the infection arose out of and in the course of his employment, instead of at some other time and in some other way. In short, under the circumstances, it was for claimant to show that the infection was connected with the accidental entry of the steel into his eye. And in this behalf counsel cite *McCoy* v. *Screw Co.*, 180 Mich. 454 (147 N. W. 572), where the relation between the infection and the employment was held not to have been established. In instances like the present, however, where the claimant himself is personally free from the disease, it is hardly possible that the source of infection can be shown absolutely by direct evidence. Nor is that necessary.

"By a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests." *Hoffman* v. *Loud*, 111 Mich. 156 (69 N. W. 231).

As has been said, the claimant was himself personally free from the disease up to the time of the accident. Such was the testimony of the doctor who attended him, and the Industrial Accident Board has found it to be a fact; nor does counsel for defendants dispute the correctness of the finding. The gonorrheal germ must have come from some outside source. It must also have been received not later than the time of the accident to have developed into the condition

Digitized by Google

found by the doctor two days afterwards, according to his testimony. These conditions, in connection with the fact, as shown, that an injured eye is more susceptible to the infection than a normal eye, and with the further fact that at once, after the accident, a fellow workman examined the eye, using for the purpose a match wrapped in a piece of cloth, create a considerable degree of probability that the germ got into the eye in the attempt to remove the steel. And this probability was sufficient to warrant the board in their finding that:

"The infection which destroyed the sight of the eye is not reasonably accounted for except as coming through or resulting from the accident."

See *Sullivan* v. *Modern Brotherhood*, 167 Mich. 524 (133 N. W. 486, 42 L. R. A. [N. S.] 140, Am. & Eng. Ann. Cas. 1913A, 1116).

If the germ was introduced in an attempt to remove the flake of steel from the eye, it was a direct consequence of the accident, and arose out of and in the course of the employment. The attempt to remove the particle of steel was a natural and necessary result of its entry into the eye; in fact, the proofs in this case seem to fairly establish the element that was lacking in the *McCoy Case*.

2. That the Industrial Accident Board acted without authority of law in allowing claimant $7.50 per week for the period of 100 weeks, even if the infection is found to have arisen out of and in the course of his employment.

The claimant was wholly incapacitated during a period of about 9 weeks, and for that he was paid $66.25, according to his receipt hereinbefore mentioned. He then resumed his work for the same company, in about the same line of employment, and at substantially the same wages he was receiving before the injury. He

Digitized by Google

does not testify to any impairment of his ability to work, nor to any reduction in wages, because of the loss of eyesight; and it was determined by this court in *Hirschkorn* v. *Desk Co.*, 184 Mich. 239 (150 N. W. 851), that the statute does not award compensation for the partial loss of an eye, except as measured by lessened earnings. Although there is no special finding upon the point, it is evident from the amount allowed that the Industrial Accident Board treated the injury as "the loss of an eye," rather than as a partial loss, and that it made its allowance under the schedule of fixed liabilities contained in section 10 of the act (Act No. 10, Extra Session 1912). Unless, therefore, the award can be sustained on that theory, it must be held to have been unwarranted.

The eye was examined for loss of sight by two experts, who made their tests separately, and in different ways. One aimed to discover how much the claimant could see when using proper eyeglasses, and found that with their assistance he had one-half of his normal vision. The other made his test without glasses, and says that the eye, unaided by artificial means, has lost 90 per cent. of its sight. Neither attempted the other's test, so that the testimony of each stands unquestioned and without impeachment by anything in the record. The net result is that, when using proper glasses, the claimant has 50 per cent. of his sight, while without them he has only 10 per cent. The evidence will not permit of any different conclusion.

Under these circumstances it seems impossible to say that the injury has resulted in the loss of the eye. The use of glasses is a very ordinary occurrence, both by the young and the old. It is unnecessary to determine whether the loss of 90 per cent. of the sight is substantially the loss of the eye, because that is not the present case. Ninety per cent. of the sight is not lost when it can be diminished to 50 per cent. by use

Digitized by Google

of common appliances. And it is the duty of the sufferer to minimize the injury as much as he reasonably may. We cannot help but feel it unfortunate, however, that further tests of the eye were not made so as to exclude all possible chance of mistake in so important a matter.

The case of *Hirschkorn* v. *Desk Co., supra,* must be held as controlling in this one. The statute seems not to have provided compensation for the partial loss of an eye under the circumstances existing here. That case, however, had not been determined when this matter was before the Industrial Accident Board.

The award must be reversed and set aside.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This case, having been submitted on briefs, without oral argument, was reassigned after the death of Justice MCALVAY.

FULLER *v.* METCALF.

1. LANDLORD AND TENANT—SET-OFF—PRESUMPTION.
   A tenant cannot plead an independent set-off in defense of an action brought by the landlord to dispossess him for nonpayment of rent; and no presumption of law can arise against the tenant for failure to insist upon such set-off as against the rent when it falls due.

2. SAME—RECOUPMENT—DELAY.
   Accordingly, it was erroneous to instruct the jury, on the trial of an action for rent, which the defense contended should be reduced by certain amounts expended for repairs

Digitized by Google

or improvements that the plaintiff authorized the tenant to install, charging the cost to the former, that the failure of the defendant to insist on his set-off, when he paid the rent, raised a presumption, which was not conclusive, but which the jury had a right to consider, that all matters in difference between the parties were settled when he made the payments. It was for the jury to say whether the delay should be treated as giving rise to an inference unfavorable to the defendant.

3. SAME—EVIDENCE—BURDEN OF PROOF.

The issue between the parties lay in whether or not plaintiff had authorized the defendant to make the repairs, and had promised to reimburse him. If the jury found for the defendant on this question, the delay in asserting the claim of the defense during a period of three years was not fatal to his right, but he had the burden of establishing his claim.

Error to Kent; Perkins, J. Submitted June 18, 1915. (Docket No. 65.) Decided December 22, 1915.

Assumpsit by Philo C. Fuller against Samuel H. Metcalf for use and occupation of certain premises. Judgment for plaintiff. Defendant brings error. Reversed.

Smedley & Linsey, for appellant.

Hatch, McAllister & Raymond, for appellee.

PERSON, J. In May, 1910, an arrangement was made between the parties to this action whereby the plaintiff was to lease to the defendant a barn in the city of Grand Rapids. Before the term should begin the plaintiff was to make certain changes and repairs the better to fit the building for defendant's business. Through a mutual expectation that the work would be completed so that the defendant might go into possession by the 1st day of July, he made payment of rent as from that date. It was agreed that the rent was to be at the rate of $50 per month during the first year, and thereafter at the rate of $60 per month.

Digitized by Google

The defendant continued to occupy the premises for about three years, making payments of rent monthly, at the agreed rates, down to April, 1913. The plaintiff then demanded an increase to $75 per month, which the defendant would not consent to. Some ill feeling arose as the result of this demand and refusal, and defendant delivered back possession of the barn to plaintiff on the 30th day of June of the year last mentioned. During April, May, and June following the attempted increase of rent, defendant sent his check to plaintiff each month at the old rate of $60 per month, but the checks were refused by the plaintiff and returned to defendant.

After the surrender of possession by defendant this action was brought for the three months' rent, and defendant gave notice of set-off. On the trial the set-off became the only question contested, inasmuch as the plaintiff conceded that he was entitled to recover only the $60 per month, and the defendant admitted that he was indebted to that extent. The defendant's set-off, which thus became the real subject of the litigation, consisted mostly of a claim for improvements and repairs to the barn made by him after he had entered into possession. It also included the amount of one-half month's rent which he thought ought to be refunded to him, because, as he testified, the plaintiff did not complete the repairs which he was to make until about the middle of July of the first year, so as to give possession.

Upon the trial the defendant testified that plaintiff, who was then about to start on a business trip to New York, told him at the time of paying the first installment of rent to make such little changes and improvements to the building as he should find necessary, and that he (plaintiff) would settle for the same upon his return. He further testified that he made the changes and improvements in reliance upon such direction and

Digitized by Google

promise, that he afterwards called the plaintiff's attention to the work he had done, and that the plaintiff neither made objections thereto nor questioned his liability for the same. The plaintiff, on the other hand, denied ever having given the defendant any authority to make any changes, or add any improvements to the barn, and denied ever having promised to pay for such work. He also testified that the defendant never called his attention to the fact that he had made such changes and improvements, and that he (the plaintiff) never acknowledged, either directly or indirectly, any liability to the defendant therefor.

Some of the items in defendant's set-off were excluded by the trial judge from the consideration of the jury, as not coming within any promise of repayment shown in the case. The items finally submitted amounted to $105. By their verdict, however, the jury entirely rejected the claim of set-off, and allowed plaintiff the full amount of the rent, with interest. After instructing the jury that, as between landlord and tenant, the landlord was not liable to the tenant for repairs made during the continuance of the tenancy, unless there was an express agreement between them that the landlord should pay for the same, the court proceeded with the following further instructions:

"Now, as to all of these matters, you are to take into consideration the fact that the defendant has paid his rent on or about the 1st day of the month during the entire period of three years without making or insisting upon his alleged set-off. That is not conclusive, however. It raises the presumption, which you have a right to consider, that all matters in difference between the parties were settled at the time he paid his rent, but it is not a conclusive presumption. You have a right to take into consideration the testimony as to the understanding and agreement between the parties and what was said and what caused the delay, if anything did cause the delay. But, ordinarily, the presumption arises under such circumstances that all mat-

Digitized by Google

ters are settled up between the parties when one or the other pays money to the other and afterwards claims that that payment was a qualified payment, and that there is still due the person making the payment money from the person to whom the payment was made. It is for you to determine under the evidence in the case as to whether these payments of rent from time to time indicate or establish the fact that all matters of difference between these parties were settled. If you find under the evidence and the circumstances of the case that they were settled, that would end the controversy, and your verdict would be for the plaintiff for the full amount claimed. If you find that they were not settled, and these items of set-off were reserved for future determination, then you will consider these items, excluding, however, the items I have called your attention to that are not proper items of set-off in this case."

Counsel for defendant except to these instructions, and the instructions certainly were objectionable.

A tenant cannot plead an independent set-off in defense of an action brought by the landlord to dispossess him for nonpayment of rent; and no presumption of law can arise against the tenant for failure to insist upon such set-off as against the rent when it falls due. As was said in *McSloy* v. *Ryan*, 27 Mich. 110:

"The defendant offered evidence to show that complainant had not performed his covenants in the lease in regard to improvements and repairs. As these covenants were independent of the covenant to pay rent, and this proceeding was not one in which, even if the amount of the rent was in issue, there could be any deduction of offsets, or by way of recoupment, the court did not err in rejecting this evidence."

The same rule is stated in 2 Tiffany on Landlord and Tenant, p. 1766, as follows:

"In a summary proceeding to recover possession on account of nonpayment of rent, the tenant cannot assert that an offset or counterclaim exists in his favor to an amount sufficient to extinguish the claim for

Digitized by Google

rent, whether the asserted claim on his part arises from a breach of covenant by the landlord or otherwise. It has been remarked that the object of the statute in providing an adequate and summary method of obtaining possession would be frustrated if the tenant could assert defenses of this character."

It was wholly for the jury to determine whether, under all the circumstances, the defendant's delay in asserting his claim against the plaintiff, if there was such delay, should be treated as giving rise to an inference unfavorable to the existence of such claim. But the delay could not, as matter of law, be held to create a presumption that the matters offered as set-off had been settled.

The burden was upon the defendant to prove that he had received authority from the plaintiff to make the repairs and improvements, and that plaintiff had promised to reimburse him therefor. These were the things that plaintiff denied, and here lay the issue. If it were found that the authority had been given and the promise made, then there was no claim by the plaintiff that the liability, once established, had ever been settled or waived by the defendant. It was improper to tell the jury, in substance, that even if the plaintiff did authorize the defendant to make the repairs and changes, and did promise to repay him for making them, it was still for them "to determine, under the evidence in the case, as to whether these payments of rent from time to time indicate or establish the fact that all matters of difference between these parties were settled." The jury might well have understood that they were authorized to reject the items of set-off because the defendant had paid his rent without insisting upon a settlement, no matter how well those items had been established originally. This was more than a merely technical error.

Digitized by Google

The judgment is reversed and a new trial ordered.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This case, having been submitted on briefs, without oral argument, was reassigned after the death of Justice MCALVAY.

In re CHAPPELL'S ESTATE.

1. EVIDENCE—COMPETENCY—GUARDIAN AND WARD—INSANITY.
   It is not proof of mental incompetency, standing alone, that respondent frequently changed her mind, or made bad business bargains, or that she failed to pay the agreed amount for driving a well.

2. SAME—INCOMPETENCY—MENTALLY INCOMPETENT.
   Under section 8709, 3 Comp. Laws, the term "mentally incompetent" as used, refers to a person whose mind has become so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action.

Error to Berrien; Bridgman, J. Submitted June 22, 1915. (Docket No. 98.) Decided December 22, 1915.

Petition by Frederick Haselo, to secure the appointment of a guardian of Orilla Haselo Chappell. From a judgment in the probate court finding her incompetent, respondent appealed to the circuit court. Judgment for petitioner. Respondent brings error. Reversed; new trial denied.

Digitized by Google

Harry A. Plummer and *John J. Sterling*, for appellant.

Harris S. Whitney, for appellee.

This is a proceeding to obtain the appointment of a guardian of the person and estate of Mrs. Haselo, now Mrs. Chappell, upon the ground that she is mentally incompetent to have the charge, custody, and management of her person and estate. Mrs. Haselo removed from Cherry Valley, Ill., to Benton Harbor in this State on October 10, 1910. She was then about 72 years of age, and in good physical health, although somewhat deaf. Her late husband, Frederick Haselo, had been dead a little more than a year. Previous to his death he had been an invalid for some 11 years, during which time Mrs. Haselo had cared for him and looked after the business on the farm. Six children had been born of her marriage to Mr. Haselo, five of whom are living, and the youngest is upwards of 40 years of age. During the long period of her husband's illness, when she had the burden of caring for him and looking after the property, she says that the children gave her but little assistance and seldom visited her. When she came to Michigan, Mrs. Haselo was the owner of a life estate in a farm of 100 acres in Illinois, left her by her late husband. This property produced a rental of from $450 to $550 per year, but she seems to have had more or less trouble in obtaining payment of the rent. She also had a home in Cherry Valley worth about $1,100, and a place in Belvidere which was sold for $1,000. Her son testifies that she had also about $800 in notes. Shortly after coming here she purchased a house and four lots in Benton Harbor, and lived there until the following March. For the purpose of buying this property she borrowed $900 from her oldest son, Frederick Haselo, and to secure its payment she gave him a mortgage on her

Digitized by Google

home in Cherry Valley, due in two years, with interest payable annually. This mortgage the son foreclosed at the end of the first year, for nonpayment of interest. This is the same son who makes this application for the appointment of a guardian.

It does not appear that any of the children visited Mrs. Haselo after she came to Michigan. She says:

"My son Fred never came here to see me until he came to make this petition; then he came to see me with an officer."

In March, 1911, she went to live with one Edgar A. Chappell, a farmer in Berrien county, as his housekeeper; and at about the same time they entered into a contract in writing, bearing date the 20th day of March, 1911, by which it was agreed that Mrs. Haselo should do such work for Mr. Chappell as is usually performed by a housekeeper, and have her board and lodging, and that Mr. Chappell should look after her business affairs, collect her rents, about which she was having some trouble, and such other moneys as might be, or become, due her, and account to her monthly for all that should come into his hands. Neither was to have any further compensation for work done under the contract, and the contract was to be revocable at the pleasure of either. Shortly after this it was agreed between Mr. Chappell and Mrs. Haselo that they would be married; and in view of the fact that she was to become his wife, it was her wish, she says, that he should have the use of her property during his lifetime, the principal being so secured that it would eventually come back to her children. In September, 1911, she executed a deed of her Benton Harbor property to a third person and had the same reconveyed to herself and Mr. Chappell jointly, so as to make a home for him, she said, if his farm should be taken away. On the 9th day of December, 1911, they entered into a further contract, whereby Mr.

Digitized by Google

Chappell was to care for, maintain, and support Mrs. Haselo so long as she might live, and provide her with medical attention and necessaries, in consideration whereof she was to do his housework and turn over to him, for his use, all her moneys and personal properties, together with all rents and income to which she might be, or might become, entitled. By the agreement Mr. Chappell was to have the use and benefit of these moneys so long as he should live; and at the end of each year he was to execute to her a mortgage on 40 acres of land conditioned for the repayment of the amount he had received during the year, such repayment to be made one year after his death, without interest. The agreement also contained the following clause:

"In the event that second party leaves the home of the first party or refuses at any time to fulfill the conditions of this agreement, then the moneys so paid to first party shall be held by him as stipulated damages for nonperformance of the contract, and this agreement terminated."

A few days after making this agreement, and on December 16, 1911, Mrs. Haselo let Mr. Chappell have $1,255, for which he gave her a mortgage on 40 acres of land due one year after his death, without interest. This land was already incumbered to the extent of from $1,400 to $1,800, as Mrs. Haselo was told at the time. When the money was advanced it was with the understanding that it should be used in the discharge of such earlier indebtedness; but an adjoining piece of land being for sale cheap, Mrs. Haselo advised Mr. Chappell to use it in the purchase of that land, rather than in the payment of the prior incumbrance. We are not told the value of this 40 acres by itself, but his entire farm of 100 acres is said to be worth $100 per acre. On March 2, 1912, she gave him $500 more, for which he made his note due one year after his death.

Digitized by Google

In June, 1913, at a time when Mr. Chappell was about to visit a relative at some distance, Mrs. Haselo made a memorandum of various sums of money that she had loaned him, exclusive of the amounts covered by the mortgage and the note above mentioned. She made two copies, with a view to protection if one should be lost, and asked him to sign them in acknowledgment of the receipt of the moneys designated. He did sign the papers, but before doing so inserted a statement reading, "This has nothing to do with, the mortgage at Plummer's is to be taken out of this." The amount acknowledged by the memorandum was $615. After Mr. Chappell had gone upon his contemplated visit, Mrs. Haselo became anxious about the statement he had inserted in the memorandum and took the paper to a lawyer's office. She was there told that Mr. Chappell's conduct throughout was very reprehensible, and that he was evidently attempting to defraud her, and she was advised to, and, being very much frightened, did, begin a suit in chancery against him to set aside the conveyance she had made and for an accounting and other relief. She also made an agreement with the attorney that he should have 15 per cent. of the value of all property recovered by him in the proceedings. At this time the contemplated marriage had not taken place, and had evidently been intentionally avoided by Mr. Chappell. An answer was filed, in which he denied, among other things, that he had ever promised to marry her. But before the suit could be heard, Mrs. Haselo and Mr. Chappell talked over their differences, and she filed with the clerk of the court a discontinuance. This was on the 4th day of November, 1913. When her attorney became aware that the suit had been discontinued by Mrs. Haselo, he at once communicated with her son Fred in Illinois, who immediately came to Michigan; and, on the 10th day of November, began these proceedings

Digitized by Google

for the appointment of a guardian. He did not attempt to get any explanation from his mother before the citation was issued and served. On the 13th day of December, 1913, a hearing was had before the probate judge, on the petition, and she was adjudged to be mentally incompetent to have the charge, custody, and management of her person and estate, for the reason, as stated in the order of the probate court, "that she is unable to comprehend or realize the results or nature of the matters and transactions into which she has entered," and because "it would appear that unless some person is appointed to protect her interests she stands in great danger of being deprived and defrauded of a considerable portion of her estate." On the 2d day of January, 1914, Mrs. Haselo took an appeal to the circuit court, where the matter came to trial before the circuit judge and a jury on the 2d day of March, 1914. But before the hearing in the circuit court, and on the 17th day of January, she and Mr. Chappell had been married, and had rearranged their property matters so that the house and lots in Benton Harbor and 40 acres of Mr. Chappell's farm were conveyed to them jointly, as husband and wife. On the trial in the circuit court, the son, Frederick Haselo, testified as follows:

"*Q. The Court:* You may state any fact or circumstance within your knowledge that will have any—throw any light on the question of the competency or incompetency of your mother.

"*A.* Only what I saw myself is it?

"*The Court:* What you know.

"*A.* I was not there at all times. Of course, her being queer in different ways, doing and having Mr. Hall there to do her business for her, and then tell me to do one thing and turn around and in probably a few minutes tell me to do something else to the contrary, had a tendency to make us think or believe that she was not just right. That they saw very frequently.

"*Mr. Sterling:* That is your answer to the court's

Digitized by Google

question? That is all you can state about it, is it? That is all you recall now?

"*A.* Yes, sir.

"*Q.* On that subject?

"*A.* Yes, sir.

"*Q.* Is that so or not?

"*A.* Yes, sir. Mr. Hall was administrator of my father's estate with the will annexed."

John F. Whiteman, son-in-law of Mrs. Haselo Chappell, also testified:

"*Q.* Is there any fact or circumstance that you can remember now connected with your mother-in-law that would make you believe that she was not mentally competent? * * *

"*A.* I can only speak of my own experience with her; I have had little dealings with her; I have lived in her property 10 years; she would agree to have things done; then after it was done she would not agree to settle for them; after I had moved out of her property she wanted me to take charge of it and rent it; I have letters—not with me—to collect rents and one thing and another, which my wife did for her and then finally put it into another man's hands to attend to it as we did not care to bother with it. One time we was there, lived there, there was no provision for water, and she told me if I would put down a partnership well with a neighbor there, she would stand for it, and pay her share, and afterwards she backed down flat and left me that expense. I had several little matters that way when she would be obstinate. Of course, my not being a direct relative, I didn't pay much attention to it."

The foregoing is all of the oral testimony offered in proof of mental incompetency. Neither the other children, nor any neighbor or acquaintance, was called to testify in that behalf. Counsel for petitioner then put in evidence the note and the mortgage above mentioned, the deed of the Benton Harbor property, the several agreements referred to, the finding of the probate judge, and the bill of complaint, together with the answer in the chancery suit, and rested.

Digitized by Google

In defense Mrs. Haselo Chappell testified fully relative to the transactions mentioned, and as to her intentions and purposes, in, and relative to, the same. She was cross-examined at considerable length. Two physicians from Benton Harbor were produced who had made examination as to her competency, each of whom gave it as his opinion that she was mentally competent in every respect. One of these physicians testified as follows:

"*Q.* Doctor, is it possible for—in your judgment and opinion—for a person to respond to all the tests you applied and everything you did to this woman, and she be incompetent to transact ordinary business affairs?

"*A.* I don't think it is possible."

Also one of her attorneys took the witness stand, and, after relating various business transactions that she had had with him, or in his presence, gave it as his opinion that she was "a mighty shrewd and remarkably well-preserved woman physically and mentally."

No rebutting testimony was offered in behalf of the petitioner. The jury returned a verdict that Mrs. Chappell was incompetent. Neither Mrs. Chappell herself, nor the physicians, nor her attorney were examined in the probate court. At the close of the testimony in support of the petition, and again when the evidence was all in, the court was requested to direct a verdict in favor of the respondent, but each request was refused.

PERSON, J. (*after stating the facts*). The application in this matter was made under the provision of section 8709, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11565); and the term "mentally incompetent," as used in that section, has been defined by this court in a number of cases.

Digitized by Google

"It does not refer to persons who are sane, but not, perhaps, as wise or intelligent as some other persons. It applies to those whose mind is so affected as to have lost control of itself to such a degree as to deprive the person afflicted of sane and normal action." *In re Guardianship of Storick*, 64 Mich. 685 (31 N. W. 582).

"The statute contemplates the existence of insanity or of mental infirmity that is equivalent in destroying mental competency." *In re Asa B. Brown*, 45 Mich. 326 (7 N. W. 899).

When this court in *Re Estate of Leonard*, 95 Mich. 295 (54 N. W. 1082), said that "incompetent" and "incapable," as used in the statute, were regarded by the legislature as synonymous terms, it did not intend to be understood as meaning that any one was mentally incompetent who was incapable of conducting his business successfully, but rather that the word "incapable," as used in the statute, was synonymous with "mentally incompetent" in the sense above defined.

There was nothing whatever in the testimony of Mrs. Haselo's son, or in that of her son-in-law, that tended in any degree to show such "mental incompetency" on her part as would authorize the appointment of a guardian of her person and estate. All they said is as consistent with competency as with incompetency. The son tells us that Mr. Hall was the administrator of his father's estate, and he gives us no reason whatever for thinking it "queer" that his mother should have had Mr. Hall do her business. Nor, without giving some specific instance in illustration, is incompetency indicated by the son's statement that his mother would tell him to do one thing, and in probably a few minutes tell him to do something else to the contrary. The only act showing incompetency on Mrs. Haselo's part, that the son-in-law could think of, was her failure to pay what she had promised for the putting down of a well, and it is absurd to call that an indication of the mental incompetency required by the statute. And

Digitized by Google

Mrs. Chappell explains the circumstances by telling us that she was unable to keep her promise because this same son-in-law would not pay the rent that he owed her.

All of the evidence in support of the petition, other than the foregoing, was the various agreements with, and conveyances to, Mr. Chappell, and the pleadings in the chancery suit. That these agreements and transfers were injudicious must be conceded. The attorney who advised Mrs. Haselo that Mr. Chappell was aiming to defraud her had apparent grounds for the advice. But it must be remembered from Mrs. Haselo's viewpoint she was dealing with the man whom she was about to marry. And, as a general rule, the fact that one makes foolish bargains is not a reason, under the statute, why he should have a guardian appointed over him.

"If it were, a goodly number of people would be under guardianship." *Partello* v. *Holton*, 79 Mich. 372 (44 N. W. 619).

An improvident business transaction may be competent evidence in support of an application for guardianship; most of the acts of a respondent in such a case are competent as going to show the mental condition. But such an improvident act becomes cogent proof of mental incompetency only as it is reinforced and explained by other facts and circumstances.

And what are the other facts and circumstances in this case? Her children permitted Mrs. Haselo, at her age, to come to Michigan alone, and seemed to have no doubt of her ability to care for herself. Her son, who files this petition, not only loaned her a substantial sum of money, but foreclosed the mortgage given to secure its payment, at the first default in interest. He could have had no doubt of her mental responsibility. The attorney who began the chancery suit for her seemed to have no question of her competency to begin

Digitized by Google

such a suit, nor of her competency to make a contract with him by which he was to receive 15 per cent. of the value of the property recovered. Two doctors, whom the trial court seemed to hold in the highest respect, made thorough examination and declared her mind to be perfectly normal, and that she was fully capable of transacting business. One of her attorneys, who had seen a good deal of her in a business way, gave the same opinion. The testimony of these gentlemen was not contradicted or seriously questioned. Her son and son-in-law could not name one instance of any value wherein she had shown herself mentally incompetent. And beyond all, her own testimony, given quite fully in the record, indicates not only a normal mind, but a rather bright one. In the light of all these circumstances the improvidence of her dealings with Mr. Chappell does not become evidence that the jury were authorized to act upon in declaring her incompetent. She is now married to Mr. Chappell, and so far as the record shows they are living together contentedly. It is his duty to care for and support her.

The judgment of the circuit court is reversed, and a new trial will not be granted. The respondent and appellant will recover costs of both courts against the petitioner.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This case having been submitted on briefs, without oral argument, was reassigned after the death of Justice MCALVAY.

Digitized by Google

JORGENSEN v. GRAND RAPIDS & INDIANA RAILWAY CO.

1. PLEADING—MASTER AND SERVANT—DEATH—INJURY TO SERVANT—AMENDMENTS—INTERSTATE COMMERCE—RAILROADS—EMPLOYER'S LIABILITY.

Where plaintiff brought an action under the Michigan statute (Act No. 104, Pub. Acts 1909), for the death of a fireman on defendant railway, and two years later, at the trial, asked for leave to amend the declaration so as to bring the claim within the Federal act relating to employer's liability (35 U. S. Stat. 63, as amended; U. S. Comp. Stat. 1913, §§ 8657-8665), not referred to in the pleading, which, however, alleged that the defendant owned and operated a system extending through Michigan and Indiana, the request, which did not involve an addition of new matter, was rightfully granted and did not operate to introduce a new cause of action.[1]

2. SAME—CONSTITUTIONAL LAW.

The Federal statute is a general law and is in force in Michigan as it is everywhere else, and the case was not like amending the declaration so as to plead a foreign statute.

3. ESTATES OF DECEDENTS—DEATH ACT.

The death act (3 Comp. Laws, § 10436, 5 How. Stat. [2d Ed.] § 13702) is applicable only to cases of instantaneous death. Actions for death that is not instantaneous must be brought under the survival act; and both rights of action for the same injury cannot exist at the same time.

4. DAMAGES—RAILROADS—FUTURE EARNINGS.

While the Michigan railroad liability act, Act No. 104, Pub. Acts 1909, allows probable future earnings to be included as damages if the death was not instantaneous, a different rule prevails in the application of the Federal act. U. S. Comp. Stat. 1913, §§ 8657-8665.

5. SAME—TRIAL—CHARGE.

Accordingly, the trial court erred in charging the jury, under the Federal statute, that future earnings might be taken into consideration in awarding damages.

---

[1]On constitutionality, application and effect of Federal employers' liability act, see notes in 47 L. R. A. (N. S.) 38, L. R. A. 1915C, 47.

Digitized by Google

Error to Kent; Brown, J. Submitted June 30, 1915. (Docket No. 108.) Decided December 22, 1915.

Case by H. Chris Jorgensen, as administrator of the estate of Emil Ingmanson, deceased, against the Grand Rapids & Indiana Railway Company for the unlawful killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Reversed.

James H. Campbell, for appellant.

Nichols & Shaw, for appellee.

PERSON, J. Plaintiff's intestate was employed by defendant as a fireman upon one of its engines, and on the 17th day of June, 1912, while the train with which he was connected was distributing gravel and other material for the maintenance of defendant's roadbed and tracks, he received an injury, attributed to defendant's negligence, from which he died on the following day. The judgment in this action, which was brought because of such alleged negligence and consequential injury, was recovered by plaintiff under the provisions of the Federal employers' liability act of April 22, 1908 (35 U. S. Stat. 65), as amended by the Act of April 5, 1910 (36 U. S. Stat. 291). The original declaration, however, by which the action was begun, did not refer to the Federal act, nor did it, in express terms, charge that the defendant was engaged in interstate commerce, but, on the contrary, counted solely upon the Michigan railroad liability act (Act No. 104, Pub. Acts 1909); and it was not until the trial had been some time in progress, and more than two years after the right of action had accrued, that an amendment was made, bringing the case under the Federal act. It is conceded by both parties that the action should have been brought under that act originally, but the amendment was strongly objected to by defendant's counsel, not only on the ground that it

Digitized by Google

operated to introduce a new cause of action, but because, also, the two years' limitation for bringing the action, embraced in the Federal act, had then intervened. The right to this amendment raises the first question argued before this court. The other questions relate to the measure of damages under the Federal law.

1. It was not error to permit the amendment. This court has already said, in *Fernette* v. *Railroad Co.*, 175 Mich. 653, 674 (144 N. W. 834, 835):

"It should be borne in mind that the declaration sets out facts which would impose a liability upon defendant under the Federal act, if it had charged that, at the time of the collision, defendant was engaged in interstate commerce. We are of opinion that it was not necessary for plaintiff to plead either statute, but that, upon the coming in of the proofs, it was the duty of the trial court to permit an amendment of the pleadings to conform thereto."

Nor did the amendment introduce any new cause of action. Congress is given power to regulate commerce between the States, and when it has acted, as in passing the Federal employers' liability act, such enactment becomes the general law of the land and supersedes all State laws upon the same subject. Therefore the reference to the State law in the declaration might well have been struck out as surplusage, and as if the reference had been to a law that had been repealed. The charges of negligence and of injury remained the same as before the amendment, and stated in substantially the same words. Had there been no allegation in the declaration that the defendant was engaged in interstate commerce and that the decedent was employed by it therein, the addition of such matter to the declaration would have amounted to simply an elaboration of the old matter, and not to the introduction of new. *Gainesville, etc., R. Co.* v. *Vandiver*, 141 Ga. 350 (80 S. E. 997). But the orig-

Digitized by Google

inal declaration in this case averred that the defendant owned, at the time of the injury, and was operating, a railway system extending through the States of Michigan and Indiana, and that the decedent was employed by it in the construction, repairing, and maintaining of the roadbed of such railway. This amounted to an allegation that the defendant was engaged in interstate commerce and that the decedent was employed by it in such commerce. *Ft. Worth, etc., R. Co.* v. *Stalcup* (Tex. Civ. App.), 167 S. W. 279. The Federal statute, as we have said, is a general law, as much in force in Michigan as anywhere, and therein this case differs from *Wingert* v. *Circuit Judge,* 101 Mich. 395 (59 N. W. 662), where it was attempted by amendment to plead a foreign law, and thereby to introduce into the declaration a cause of action that did not exist under our laws. Although the amendment, in the instant case, was made more than two years after the injury occurred, it stated no new cause of action, but related back to the original declaration, which was filed and served in due season so that the bar of the statute had not intervened. *Grand Trunk, etc., R. Co.* v. *Lindsay,* 233 U. S. 42 (34 Sup. Ct. 581, Am. & Eng. Ann. Cas. 1914C, 168); *Missouri, etc., R. Co.* v. *Wulf,* 226 U. S. 570 (33 Sup. Ct. 135, Am. & Eng. Ann. Cas. 1914B, 134); *Michigan, etc., R. Co.* v. *Vreeland,* 227 U. S. 59 (33 Sup. Ct. 192, Am. & Eng. Ann. Cas. 1914C, 176); *Smith* v. *Railroad Co.,* 210 Fed. 761 (127 C. C. A. 311); *Hogarty* v. *Railway Co.,* 245 Pa. 443 (91 Atl. 854); *Vandalia R. Co.* v. *Stringer,* 182 Ind. 676 (106 N. E. 865, 107 N. E. 673); *Flanders* v. *Railway Co.,* 68 Fla. 479 (67 South. 68).

2. But the trial court was in error in allowing the loss of future earnings to be included in the damages under the Federal act. This undoubtedly came from a misunderstanding of the construction given to that act by the Federal courts, and a natural inclination to

Digitized by Google

apply to it the construction given to various State statutes.

Under the law and practice of this State it has been held that the statute commonly called the "death act" (3 Comp. Laws, § 10427; 5 How. Stat. [2d Ed.] § 13702) is applicable only to cases of instantaneous death; that where death is not instantaneous the action should be brought under the so-called "survival act" (3 Comp. Laws, § 10117; 5 How. Stat. [2d Ed.] § 12761); and that both rights of action, for the same injury, cannot exist at the same time (*Oliver* v. *Railway Co.*, 134 Mich. 367 [96 N. W. 434, 104 Am. St. Rep. 607, 3 Am. & Eng. Ann. Cas. 53]; *Storrie* v. *Elevator Co.*, 134 Mich. 297 [96 N. W. 569]; *West* v. *Railway*, 159 Mich. 269 [123 N. W. 1101]; *Ely* v. *Railway*, 162 Mich. 287 [127 N. W. 259]). And while the "death act" is recognized as creating a new right of action, unknown to the common law, and authorizing damages with reference strictly to the pecuniary injury, suffered by certain beneficiaries, the "survival act" is treated as effecting a continuance of the right of action that had vested in the decedent, with such damages as he could have recovered, including the present worth of his probable future earnings had he lived. The Michigan railroad liability act of 1909 (Act No. 104, Pub. Acts 1909) has also been construed as allowing probable future earnings, in cases where death was not instantaneous, to be included among the damages in an action under that act. *Habitz* v. *Railroad Co.*, 170 Mich. 71 (135 N. W. 827).

The Supreme Court of the United States has taken a somewhat different view of the Federal employers' liability act. The first section of that act reads as follows:

"SECTION 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States

Digitized by Google

and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment." 35 U. S. Stat. 65, U. S. Comp. Stat. 1913, § 8657.

Like our State statutes, this section provides for two distinct actions, one for the benefit of the employee himself where death is not instantaneous, and the other for the benefit of certain relatives whereby they are to receive compensation for their financial loss and damage resulting from the employee's death. But as the act originally stood it contained no provision for the survival of the action that might be brought by the employee himself, that right, of course, ending with his death. Subsequently the act was amended (Act of April 5, 1910, 36 U. S. Stat. 291), by adding the following section:

"SEC. 9. That any right of action, given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." U. S. Comp. Stat. 1913, § 8665.

As the act now stands amended, there can, of course,

Digitized by Google

be but one action if the injury results immediately in the employee's death, and that is the action to compensate the relatives for their financial loss because of his death. But when the injury does not result in immediate death the construction given to the act differs from that given to the State statutes, at least in this: That the right of action for the benefit of the relatives does not depend upon the instantaneous death of the employee, but will arise whenever such death does occur, providing it results from the injury; and the right which the employee himself had to bring an action will survive, so that both rights will be in existence at the same time, and may be united by the personal representative in one action. And when so united the personal representative will recover, not only compensation for such financial loss as the beneficiaries have suffered from the employee's death, but also such damages as the employee might have recovered, including those for pain and suffering, but not those for the loss of future earnings.

In *St. Louis, etc., R. Co.* v. *Craft*, 237 U. S. 648 (35 Sup. Ct. 704), the construction of the Federal act, and the theory upon which damages may be recovered under it, are very fully set forth. The action in that case was brought by an administrator to recover for injuries to, and the death of, his intestate, and the damages sought to be recovered were for (*a*) the pecuniary loss to the father by reason of the death, and (*b*) conscious pain and suffering of the decedent before the injuries proved fatal. The court, among other things, said:

"If the matter turned upon the original act alone, it is plain that the recovery here could not include damages for the decedent's pain and suffering, for only through a provision for a survival of his right could such damages be recovered after his death. But the original act is not alone to be considered. On April

Digitized by Google

5, 1910, prior to the decedent's injuries, the act was 'amended.' * * * No change was made in section 1 [U. S. Comp. Stat. 1913, § 8657]. *Taylor* v. *Taylor* 232 U. S. 363, 370 [34 Sup. Ct. 350]. It continues, as before, to provide for two distinct rights of action; one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his personal representative 'for the benefit of' the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. It does not mean that the injured person's right shall survive to his personal representative and yet be unenforceable by the latter, or that the survival shall be for the benefit of the designated relatives and yet be of no avail to them. On the contrary, it means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced and the proceeds paid to the relatives indicated. And when this provision and section 1 are read together the conclusion is unavoidable that the personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss, but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while he lived. Although originating in the same wrongful act or neglect, the two claims are quite distinct; no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the

Digitized by Google

same action is not a double recovery for a single wrong, but a single recovery for a double wrong. * * *

"Much stress is laid upon the concluding clause in the new section, 'but in such cases there shall be only one recovery for the same injury.' Passing and reserving the question of its application where there has been a recovery by the decedent in his lifetime (see *Michigan, etc., R. Co.* v. *Vreeland, supra* [227 U. S. 59, 70, 33 Sup. Ct. 192, Am. & Eng. Ann. Cas. 1914C, 176]), we think this clause, as applied to cases like the present, is not intended to restrict the personal representative to one right to the exclusion of the other, or to require that he make a choice between them, but to limit him to one recovery of damages for both, and so to avoid the needless litigation in separate actions of what would better be settled once for all in a single action. This view gives full effect to every word in the clause and ascribes to it a reasonable purpose without bringing it into conflict with other provisions the terms of which are plain and unequivocal. Had Congress intended that the personal representative should make an election between the two rights of action and sue upon one only, it is not easy to believe that it would have chosen the words in this clause to express that intention."

The construction given to the Federal act by the Supreme Court of the United States is controlling. And because of the misconception of the trial court as to the scope of the act, thus construed, and as to the damages that may be recovered under it, its judgment is reversed, and a new trial granted.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This case having been submitted on briefs, without oral argument, was reassigned after the death of Justice MCALVAY.

Digitized by Google

GIFFORD *v.* WASHTENAW CIRCUIT JUDGE.

MANDAMUS—ADEQUATE REMEDY AT LAW—ESTATES OF DECEDENTS—PROBATE COURT—EXECUTOR'S FINAL ACCOUNT—APPEAL.

Mandamus is not the proper remedy to vacate an order reinstating an appeal from probate court by legatees of an estate, in relation to the final account of the administrator, where the notice of filing the appeal was not served in time, and the record or other papers were not returned from probate court in the 30 days' period as required by statute (1 Comp. Laws, § 672; 5 How. Stat. [2d Ed.] § 12120).

Mandamus by William W. Gifford as administrator and trustee of the estate of Charles K. Perrine, deceased, against Edward F. Kinne, circuit judge for the county of Washtenaw, to compel the respondent to vacate an order reinstating an appeal from probate court of Albion College and another. Submitted June 15, 1915. (Calendar No. 26,567.) Writ denied December 22, 1915.

A. J. Sawyer (*James G. McHenry,* of counsel), for relator.

Robert A. Smith (*Wilson & Cobb,* of counsel), for respondent.

PERSON, J. The relator asks a mandamus to compel the respondent to vacate an order reinstating an appeal from the probate court. On the 20th day of June, 1914, the probate court for the county of Washtenaw made an order allowing the final account of relator as administrator with the will annexed of the estate of Charles K. Perrine, deceased. Within the 60 days allowed by statute—that is, on the 13th day of the following August—Albion College and Alma College,

Digitized by Google

residuary legatees under the will, filed with the judge of probate their notice of appeal from such order, with their reasons therefor, and a duly approved bond. Upon the same day the probate court made a further order directing that notice of such appeal should be personally served upon the relator, as the adverse party, within 30 days from that date. The notice of appeal was not served upon the relator as directed by the probate court, nor was a copy of the record appealed from, or of the other papers required by law, filed in the circuit court within the 30 days after the taking of the appeal, wherefore the appeal ceased, by virtue of the statute, to be of any effect. Within the first 10 days of the term of the circuit court next succeeding the expiration of the 30 days allowed for filing the record, appellants made application, under the provisions of section 672, 1 Comp. Laws (section 12120, 5 How. Stat. [2d Ed.]), for a reinstatement of the appeal. Upon the hearing of this application the circuit court made an order reinstating the appeal.

It is claimed by the relator that he had not sufficient or proper notice of the hearing upon the application to reinstate the appeal; that the showing upon which the order of reinstatement was made was not sufficient to give the court jurisdiction; and that, for these reasons, the order should be vacated and set aside.

As has been frequently held by this court, mandamus is not the proper remedy in cases of this kind. The court retained jurisdiction of the appeal, and the relator, providing he does nothing amounting to a waiver, may review the order complained of by writ of error after final judgment. The situation does not differ in principle from that in *Mikkola* v. *Circuit Judge*, 165 Mich. 583 (130 N. W. 1118), where this court refused to allow a mandamus for the purpose of vacating an order granting a dilatory appeal from justice's court.

Digitized by Google

The writ is therefore denied.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This motion having been submitted on briefs, without oral argument, was reassigned after the death of Justice MCALVAY.

WISCONSIN CHAIR CO. *v.* CHARLEVOIX CIRCUIT JUDGE.

1. JUDGMENTS—NOTICE, REQUIREMENT OF.

Notwithstanding a statutory requirement that the clerk of the court give notice to the interested parties or their attorneys of any order or judgment entered in vacation, attorneys are charged with notice of all orders and judgments entered during a term of court in any cause which is in condition for the same.

2. PRACTICE—FINDINGS—AMENDMENTS—TIME.

It is from the entry of the judgment that the period begins to run in which amendments may be proposed to the findings of fact and law of the court, not from the filing of the findings. Circuit Court Rule 26*b*.

3. SAME—FINDINGS—JUDGMENT—ENTRY.

Upon the trial of an issue of fact by the court without a jury, the judgment cannot properly be entered until after the findings have been filed.

4. SAME—TRIAL—MISTAKE IN ENTERING.

The findings are the basis for the judgment: yet, a judgment inadvertently entered before the filing of the findings is not void and may be regarded as in the nature of provisional action which only becomes perfected when the findings are completed.

Digitized by Google

5. SAME—TIME—VACATING JUDGMENT.

Whether findings of fact and law were filed during the term or in vacation when the parties would be entitled to notice, if the premature entry of judgment tends to deprive any party of his rights, it should, if necessary, be vacated and set aside. Some injury must be shown, however. Such a judgment will not be set aside simply as matter of abstract right.

6. SAME—DELAY.

And where counsel for the relator did not become aware of the entry of judgment in a nonjury trial before the court, until nearly six weeks had elapsed, and some weeks thereafter made application for leave to open the case and proposed amendments to the findings, which were referred to in the motion, but were not therewith filed, and the court requested the attorney to submit the proposed amendments to the court, the motion which in effect was one for an extension of time, was not improperly overruled, counsel declining to submit the proposed findings to the consideration of the trial court, without justification or excuse. Circuit Court Rule 26*b*.

Mandamus by the Wisconsin Chair Company against Joseph Barton, presiding judge of the county of Charlevoix, to require the respondent to vacate a judgment and afford an opportunity to file proposed amendments to the findings of the court. Submitted October 27, 1915. (Calendar No. 26,512.) Writ denied December 22, 1915. Rehearing denied April 21, 1916.

Parm C. Gilbert and *R. W. Kane,* for relator.

A. L. Fitch and *John Jones,* for respondent.

PERSON, J. One Charles G. Bush brought an action against the relator in the circuit court for the county of Charlevoix to recover for certain commissions alleged to be due on the sale of lands. The action was tried in July, 1914, beginning on the 7th, and terminating on the 8th. The trial was had before the respondent, who is circuit judge of the twenty-seventh judicial

Digitized by Google

circuit, but who at the time was holding court in the county aforesaid. Before, or during the progress of, the trial, the attorneys for the defendant, relator here, filed a request in writing for findings of law and fact. A copy of this request was served upon the attorneys for plaintiff, and before the conclusion of the trial was brought to the attention of the circuit judge, who stated that he would comply with the request. He announced, however, that his mind was made up as to the merits of the case, and that he should enter judgment for the plaintiff for $3,139. On the same day the clerk did enter judgment for this amount without waiting for the special findings. The circuit judge states in his return that this judgment was entered inadevertently by the clerk, without request or direction so to do, and this must be taken as a correct explanation, although the language of the court in announcing his view of the case might well have been understood by the clerk as a direction to enter the judgment at once. The respondent, having closed his work in Charlevoix, returned to his home in Big Rapids, and thereafter mailed his findings of law and fact to the clerk of the court, and these were filed on the 20th day of July aforesaid. No notice of the filing of these findings was given to the attorneys for the relator, and no such notice was directed by the circuit judge to be given. That such special findings had been filed was not discovered by the attorneys for relator until the 20th day of the following August; and thereafter, on the 8th day of September, they filed a motion, which was heard by respondent on the 25th day of that month, asking that the judgment be vacated, and that relator have 20 days in which to propose amendments to the findings of fact and law, and to file exceptions. This motion was denied by respondent, and, as stated by him in his return to this court, for the following reasons:

Digitized by Google

"The motion was not accompanied by the proposed amendments and exceptions, although the request as set forth in the motion referred to them as 'therein made,' and counsel did not present for my consideration the amendments and exceptions proposed. The hearing of the motion was held at Charlevoix in the forenoon of September 25, 1914, Mr. R. W. Kane appearing for the motion. Mr. Gilbert was not present and did not appear at this hearing. On my own motion, after calling the attention of counsel to the absence of the proposed amendments and exceptions, I held the hearing open until the afternoon to enable counsel to prepare and present the proposed amendments, stating that I would give counsel all the time reasonably required to properly present the matter so that a proper disposition could be made of all the questions raised. At the afternoon session counsel appeared, but offered no proposed amendments or exceptions, renewing the request for the time asked in the motion. In view of the length of time that had elapsed and the opportunity afforded counsel to prepare and present such amendments and exceptions as they desired, I declined to grant the leave asked. No claim was made by counsel for the motion that the findings were not sufficiently full and definite on the facts and law, nor did counsel point out or indicate wherein or in what respect the findings were erroneous, insufficient, or indefinite."

On the 12th day of October counsel for the relator brought on a second motion before respondent that the preceding motion be vacated and set aside. No new or further showing was made as the basis for this last motion, nor did counsel then tender any proposed amendments or exceptions. The motion was denied by the circuit judge. Thereupon relator makes this application for a mandamus to compel the respondent to vacate his order last mentioned, and to grant the motion of September 8th, that the judgment be set aside and relator given permission to propose amendments and exceptions to the findings of law and fact.

We believe it is the practice of many circuit judges

Digitized by Google

to have the clerk notify counsel of the filing of findings of law and fact, and of other determinations by the court, and we think this very commendable, but we know of no rule or authoritative requirement that it be done, except as hereinafter stated.

Counsel are supposed to take notice of all orders and judgments entered during term. There is, however, a statutory provision that the clerk shall give notice to the parties or their attorneys of any judgment entered in vacation, in such manner as the circuit court shall, by general or special order, direct. Section 10265, 3 Comp. Laws; 4 How. Stat. (2d Ed.) § 11847. And it is from the entry of the judgment that the period begins to run in which amendments may be proposed to the findings of fact and law, and not from the filing of such findings. Circuit Court Rule No. 26 (*b*).

And upon the trial of an issue of fact by the court without a jury, the judgment cannot properly be entered until after the findings of fact and law shall have been filed. *Stansell* v. *Corning,* 21 Mich. 242; *Ells* v. *Rector,* 32 Mich. 379. The findings are the basis for the judgment; yet a judgment inadvertently entered before the filing of the findings is not void, and may "be regarded as in the nature of provisional action, which only becomes perfected when the findings are completed." *O'Blinskie* v. *Circuit Judge,* 34 Mich. 62; *Preger* v. *Barnett,* 175 Mich. 494 (141 N. W. 587). And the time for proposing amendments to the findings should date from the day when the judgment properly could have been taken. *O'Blinksie* v. *Circuit Judge, supra.* We are not informed by this record whether the findings of fact and law were filed during term, or were filed during vacation when the parties would be entitled by the statute to notice of the judgment, but in either case, if the premature entry of the judgment tends to deprive any party of his rights, it should, if necessary, be vacated and set aside.

Digitized by Google

Some injury, however, must be shown; for such a judgment will not be set aside simply as a matter of abstract right.

But we cannot see, on this record, where any right of the relator has been impaired by the premature judgment. The only injury claimed by him is that the ten days allowed him by rule for the filing of amendments, and the subsequent four days for taking exceptions, had passed before he learned that the findings of the court had been filed. But by the terms of Circuit Court Rule No. 26 amendments to the findings follow the entry of judgment, and do not precede it; and the court has the power to make any reasonable extension of the time for filing them that may be necessary. When the relator made his motion of September 8th, which was really a motion for further time in which to propose amendments and take exceptions, the court did not peremptorily overrule the motion, but requested relator to submit the amendments which he wished made to the inspection of the court. This the court had a perfect right to do, not only for the dispatch of business, but also to be assured that the proposed amendments were such as should be considered, and not immaterial or frivolous. *School District No. 4 of Easton* v. *Snell*, 24 Mich. 350; *Slocomb* v. *Thatcher*, 20 Mich. 52; *Wiley* v. *Lovely*, 46 Mich. 83 (8 N. W. 716). In fact, the court held the motion open for a time to permit counsel to formulate such amendments and exceptions as he might desire to offer, although there had elapsed some three weeks in which to do this after the discovery that findings had been filed. And when counsel declined to accede to this very proper request of the court, or to render any excuse for not doing so, we think the court was justified in overruling his motion. Even when the order overruling this motion was subsequently sought to be set aside, no proposed amendments or ex-

Digitized by Google

ceptions were offered for the consideration of the court. We do not think that relator has been wrongfully deprived of his right to propose amendments and exceptions, and the writ of mandamus must be denied.

The writ is denied.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

TRUMBULL MOTOR CAR CO. *v.* WAYNE CIRCUIT JUDGE.

1. MANDAMUS—DISCRETIONARY NATURE OF WRIT—JURISDICTION.
   The writ of mandamus will be allowed to require the lower court to take jurisdiction of a proceeding or action because a refusal to take jurisdiction would tend to deprive the litigant of any remedy, but if jurisdiction be wrongfully assumed the determination may be reviewed by appeal or writ of error, in which case mandamus is not ordinarily granted.

2. SAME—ABATEMENT—QUASHING SERVICE.
   Hence, the refusal to quash service of process on a foreign corporation for the reason assigned that the point should be presented by a plea in abatement, the court retaining jurisdiction over the parties and denying the motion amounted to the retention of jurisdiction and it could be reviewed on error. The remedy at law was adequate, and mandamus will not issue.

Mandamus by the Trumbull Motor Car Company against Patrick J. M. Hally, one of the circuit judges for the county of Wayne, to require respondent to vacate an order denying relator's motion to quash service of process in an action in which it was defendant.

Digitized by Google

Submitted October 5, 1915. (Calendar No. 26,859.)
Writ denied December 22, 1915.

Moore & Moore, for relator.

Albert McClatchey, for respondent.

PERSON, J. On the 17th day of May, 1915, Henry N. Backus, Burr Lobdell, and Herbert W. Cheney, as copartners, doing business as the Badger Cycle Car Company, began an action in assumpsit against the relator, the Trumbull Motor Car Company, in the circuit court for the county of Wayne. The defendant is a foreign corporation, organized under the laws of Connecticut, with its principal place of business at Bridgeport in that State. The declaration, with rule to plead and notice thereof, was served upon one Robert R. Adams, in the city of Detroit, as agent of the defendant. Claiming that such service was insufficient and void, the relator, defendant in the action, moved the circuit court to quash the service and dismiss the case. This motion was denied by the circuit judge.

It is claimed by counsel for relator that the circuit judge practically refused to pass upon the sufficiency of the service, holding that the question should have been raised by plea in abatement instead of by motion. The return, however, shows that this is a misunderstanding. The circuit judge did pass upon the motion and overruled it. In doing so he says he found as a fact that Mr. Adams was defendant's agent; and he could not well have found otherwise, inasmuch as the agency was positively averred in the affidavit of service, and was not disputed in any of the affidavits filed by the defendant. What the circuit judge did decline to find was whether the defendant was doing a local business in Michigan, and whether any part of the contract was to be performed in this State.

Digitized by Google

It is true that defendant's counsel had offered to consent to the framing of an issue and to the taking of proofs as to the facts, but neither side requested that such issue be framed, and the motion was actually submitted on affidavits. And this was the reason why the judge would not decide the facts above mentioned. He claimed to be unable to do so upon mere affidavits; and, in making the order overruling the motion, he reserved the right to the defendant of filing a plea in abatement and thereby raising such issues and taking such proofs as to the service as he should deem material. Counsel for defendant, however, had declined to avail himself of this privilege, preferring to insist upon his motion, and has come to this court, asking for a mandamus requiring the circuit judge to set aside the service of the declaration and dismiss the action. In this we think that the defendant, the relator here, has mistaken his remedy. It is true that mandamus has sometimes been granted in such cases, as in *Grand Trunk R. Co.* v. *Circuit Judge,* 106 Mich. 248 (64 N. W. 17), and the earlier cases cited in relator's brief. But mandamus is not a writ of right, and, as a general rule, will not lie where the law has provided another remedy. In *Michigan Mutual Fire Ins. Co.* v. *Circuit Judge,* 112 Mich. 270 (70 N. W. 582), attention was called to "the growing frequency of applications for mandamus asking this court to review the action of subordinate courts, resulting in overloading this court with work which does not finally dispose of the case," and a determination was there indicated, on the part of this court, to adhere more strictly in the future to the general rule above mentioned. And it was said in that case:

"The writ will be entertained when the court has refused to retain jurisdiction, supposing it had no jurisdiction when it had jurisdiction in fact, because, if the writ was not entertained under such circum-

Digitized by Google

stances, the party would be without remedy. On the contrary, if the court claims jurisdiction in a case where it is not entitled to exercise it, such action of the court can be reviewed by appeal or writ of error. In such a case the writ of mandamus ought not to issue."

In that case, as in the one at bar, it was attempted by mandamus to have the service of process set aside, and the writ was denied for the reason above given.

In *Cattermole* v. *Circuit Judge,* 136 Mich. 274 (99 N. W. 1), the opinion, in referring to the above case of *Michigan Mutual Fire Ins. Co.* v. *Circuit Judge,* says:

"When that opinion was written, it was the deliberate intention of the court to reduce the practice by mandamus to uniformity, so far as practicable, with reference to the disposition of cases upon jurisdictional questions, denying the writ, under the well-settled rule, where jurisdiction was retained."

And in *City of Flint* v. *Circuit Judge,* 146 Mich. 439 (109 N. W. 769), this court considered in some detail the office and scope of a writ of error, and what matters would be brought up by such writ. See, also, *Mikkola* v. *Circuit Judge,* 165 Mich. 583 (130 N. W. 1118), and the cases therein cited.

In the instant case the circuit court retained jurisdiction by its order overruling the motion, and relator has a complete remedy by writ of error if it desires to stand upon, and not to waive, its alleged rights. It had also the privilege of testing the sufficiency of the service by plea in abatement, and of bringing the resulting judgment to this court by writ of error, if not satisfactory.

The writ is denied.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

McCREERY *v.* ROFF.

ROFF *v.* MILLER.

1. PRACTICE—TITLE—SUMMARY PROCEEDINGS—CIRCUIT COURT COMMISSIONER.

Upon writ of error to review a judgment for plaintiff in summary proceedings for the possession of real property, the cause should be entitled in the names of the parties to the proceeding before the circuit court commissioner, who is not properly a party in the circuit or appellate court and should not be named in the title of the action.

2. COSTS—SECURITY — NONRESIDENTS — CIRCUIT COURT COMMISSIONER.

The propriety of entering an order requiring security for costs of a nonresident complainant in summary proceedings is not reviewable but rests in the discretion of the commissioner.

3. MORTGAGES—REDEMPTION—ASSIGNMENTS.

One may purchase the mortgage interest, after foreclosure by advertisement, from the buyer at public sale, and a junior incumbrancer may secure an assignment before sale and foreclose in his own interest or he may buy the equity of the purchaser during the period of redemption.

4. SAME.

And where the prior mortgage was redeemed the second mortgagee, or his assignee, might foreclose as against the owner or any subordinate interests.

5. SAME—JUNIOR INCUMBRANCE.

In the absence of peculiar and unusual equities, no reason is apparent why the holder of a second mortgage may not purchase the equitable interest acquired at foreclosure sale by the first mortgagee, or his representatives, and the effect is not the same as redemption, whereby it has been held that the foreclosure deed becomes void and of no effect.

6. SAME—ESTATES OF DECEDENTS—CONVEYANCES BY EXECUTOR.

Section 9361, 3 Comp. Laws, requiring the approval of the probate judge to the assignment of the rights of an ex-

Digitized by Google

tate in real property acquired on foreclosure, etc., does not apply to the purchase of a mortgage interest before expiration of the redemption period: it would become applicable after the title of the estate had become absolute.

7. SAME—EQUITABLE DEFENSE—SUMMARY PROCEEDINGS.
The defense of equitable estoppel, based on the theory that the defendant was induced to believe that complainant was not insisting on the rights acquired by foreclosure sale, and he therefore relaxed his effort to raise the money, is an equitable defense and will be entertained only in a suit in chancery.

Error to Calhoun; North, J. Submitted October 6, 1915. (Docket No. 14.) Decided December 22, 1915.

Summary proceedings by Vance McCreery against Frank E. Roff and another for the possession of real property. Judgment for complainant, which defendants removed by certiorari to the circuit court. Judgment for complainant. Defendants bring error. Affirmed.

J. M. Hatch & Son, for relator.

Winsor & Robinson, for respondent.

PERSON, J. Summary proceedings were begun before the circuit court commissioner by one Vance McCreery to obtain possession of lands alleged in the petition to be held unlawfully and against his rights by Frank E. Roff and Cyrus C. Sterling. The commissioner rendered judgment in favor of the complainant, and the proceedings were removed to the circuit court by certiorari, where the judgment of the commissioner was affirmed. The case is now brought to this court by writ of error. By some inadvertence the proceedings are wrongly entitled both here and in the circuit court. Mr. Roff is not a relator, but a defendant, and the circuit court commissioner is not a party to the cause at all. This is an action in which Vance

Digitized by Google

McCreery is complainant and Frank E. Roff and Cyrus C. Sterling are defendants, and which should have been so entitled. Inasmuch, however, as it has been fully argued for both sides without objection, and the record shows plainly the actual controversy before the court, we will dispose of it upon its merits.

The defendant Roff became owner of the premises through a quitclaim deed from Cyrus C. Sterling and wife, bearing date December 15, 1911. The consideration was mentioned therein as "one dollar and other considerations." When this conveyance was made to Mr. Roff, the lands were incumbered by two mortgages, the first having been executed to one Joseph Ferguson on April 1, 1909, for $6,000, and interest, and the second to Vance McCreery, on September 28, 1909, for $3,500, and interest. Both were duly recorded. Mr. Ferguson having died, one Charles A. McLees, as the executor of his will, proceeded to foreclose the first mortgage by advertisement, under the statute, and on the foreclosure sale bid in the property as such executor, receiving a sheriff's deed thereof, bearing date October 15, 1913. After the sale, and before the period for redemption had expired, that is, on the 9th day of July, 1914, Vance McCreery, the complainant, to protect his second mortgage, purchased all of the rights of the executor under the foreclosure sale, paying him $6,647.15, the amount of his bid, with interest, and taking from the executor an assignment of the first mortgage, together with a quitclaim deed of the lands. The deed included an assignment of the executor's rights under the foreclosure, in the following language:

"And I also assign, transfer and set over all my right, title and interest to the proceedings in foreclosure of the above-described mortgage together with all and singular, the hereditaments and appurtenances thereunto belonging or in any wise appertaining."

Digitized by Google

After the period for redemption had expired McCreery served notice upon defendants to surrender possession of the premises, and following such notice began these proceedings before the circuit court commissioner, on the 26th day of October, 1914.

To the judgment of restitution in favor of McCreery, rendered by the commissioner, and affirmed by the circuit court, the appellant Roff urges the following objections: That the commissioner lost jurisdiction of the case by refusing to order security for costs; that the only right of McCreery, as junior mortgagee, was to redeem, and that he could not, by purchase from the executor, acquire for himself the benefits of the foreclosure and, through that proceeding, title to the land; that the deed from the executor to McCreery was void, inasmuch as it did not have the approval of the judge of probate, as required by 3 Comp. Laws, § 9361 (4 How. Stat. [2d Ed.] § 11072); that McCreery is estopped from asserting title through the foreclosure proceedings because of a letter written by him to Roff under date of September 22, 1914, whereby the latter was deceived into the belief that McCreery did not intend to rely upon such title. These objections will be considered in their order.

1. On the return day of the summons before the circuit court commissioner, the defendant Roff appeared specially and demanded security for costs from the complainant, McCreery, because the latter was a nonresident of this State. The commissioner declining to make an order requiring such security, the defendant pleaded to the merits and went to trial. It is now claimed by him that in refusing to make the order as requested, the commissioner lost jurisdiction of the proceedings. It is stated in the opinion filed by the circuit judge that the point was not urged before him, although counsel for defendant suggested that he did

Digitized by Google

not wish to abandon it entirely. It is not claimed that there is in the statute conferring jurisdiction in cases of this kind upon circuit court commissioners any provision making it obligatory upon them to require security for costs from nonresidents. Nor can the law governing the matter in justice's court (1 Comp. Laws, § 713 [5 How. Stat. (2d Ed.) § 12169]), or that applicable to circuit courts (3 Comp. Laws, § 9990 [5 How. Stat. (2d Ed.) § 12653]), be held controlling. Without some express provision somewhere making it mandatory that security for costs be required of all nonresident complainants in summary proceedings, the propriety of such order must be considered as within the discretion of the commissioner. *McDowd* v. *Circuit Judge,* 41 Mich. 551 (49 N. W. 923); *Goodenough* v. *Burton,* 146 Mich. 50 (109 N. W. 52).

2. It is admitted by Roff in his affidavit for certiorari that each mortgage was a valid lien upon the land paramount to his rights; but he insists that a junior mortgagee cannot, upon foreclosure of a prior mortgage, acquire the legal title through an assignment from the purchaser at the foreclosure sale. He argues that, because of his fiduciary relations to the mortgagor and those claiming under him, any such attempted purchase by a junior mortgagee, before the sheriff's deed becomes operative, amounts only to redemption, citing *Johnson* v. *Johnson,* Walk. Ch. 331. But the statute relative to redemption has been somewhat changed since that case was decided. It is now settled that the purchaser, at a foreclosure by advertisement, ordinarily acquires an equitable interest in the land which he may, during the period given for redemption, transfer in full to another. And that his assignee, if there is no redemption, will take the legal title when it matures exactly as the original bidder himself would have taken it. *Gage* v. *Sanborn,* 106 Mich. 269 (64 N. W. 32).

Digitized by Google

And, in the absence of peculiar and unusual equities, no reason is apparent why the holder of a second mortgage may not purchase this equitable interest, arising on the foreclosure of a prior mortgage, as well as any one else. There is a marked difference between redeeming, which is a matter of right, and taking an assignment of the equitable interest acquired by the purchaser on foreclosure, which is a matter of contract between the parties. *Lieblien* v. *Hansen*, 178 Mich. 11 (144 N. W. 496); *Frisbee* v. *Frisbee*, 86 Me. 444 (29 Atl. 1115). Upon redemption the foreclosure deed, by force of the statute, becomes "void and of no effect" (3 Comp. Laws, § 11143 [5 How. Stat. (2d Ed.) § 13938]); but no such result ordinarily follows an assignment (*Gage* v. *Sanborn*, *supra*).

The right of a subsequent mortgagee to require the assignment to himself of a prior mortgage, after it has fallen due and before its foreclosure, is no longer a question in this State. *Williams Bros. Co.* v. *Hanmer*, 132 Mich. 635 (94 N. W. 176); *Lamb* v. *Jeffrey*, 41 Mich. 719 (3 N. W. 204). And he may at once proceed to foreclose such mortgage after it has been assigned to him.

Upon redemption from a prior mortgage the subsequent mortgagee may foreclose his lien as against the owner of the land and all others whose interests are subordinate to his. *Powers* v. *Lumber Co.*, 43 Mich. 468 (5 N. W. 656). And a junior mortgagee may bid in the land, with all of the rights of any purchaser upon the foreclosure of a prior mortgage by advertisement. Jones on Mortgages (6th Ed.), § 1884; Pingree on Mortgages, § 1390.

McCreery had an undoubted right, in this case, to take from the executor of the Ferguson estate an assignment of the latter's interest, acquired at the foreclosure of the first mortgage, and the legal title to the

Digitized by Google

lands vested in him when the sheriff's deed became operative.

3. Objection was made before the commissioner to the admission in evidence of the quitclaim deed, given by the executor to McCreery. The objection was based upon the fact that the deed had not been approved by the judge of probate, in accordance with the provisions of section 9361, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11072), which reads as follows:

"Any real estate which may have been purchased or which may hereafter be purchased by an executor or administrator as such, upon a sale on execution for the recovery of a debt to the estate, or upon a sale in the foreclosure of a mortgage held by said executor or administrator (whether owned by the deceased in his lifetime or acquired after his death), shall be considered as personal estate and may be sold and conveyed by said executor or administrator in like manner as personal estate may now be sold, and the proceeds thereof shall be held and divided as personal estate: *Provided,* such sale shall first be approved by the judge of probate having jurisdiction of such estate by an order entered in the journal of the court a copy of which order shall be attached to and recorded with the deed given by such executor or administrator."

This section of the statute applies, however, only when an executor or administrator has taken the legal title to real estate. It would have become applicable if the executor in this instance had retained the equitable interest acquired by him at the foreclosure sale until the period of redemption had expired and the deed executed to him by the sheriff had become operative. Such legal title does not vest at once upon the auction sale on statutory foreclosure (Jones on Mortgages, § 1884), but only at the expiration of the period allowed for redemption. Until the end of that period the foreclosure proceedings may be abandoned, if the parties choose to do so (*Dodge* v. *Brewer,* 31 Mich.

Digitized by Google

227), or a subsequent mortgagee may still demand an assignment of the mortgage. (*Moore* v. *Smith*, 95 Mich. 71 [54 N. W. 701]). The effect of the quitclaim deed in this case was not a conveyance of real estate within the meaning of the statute, but an assignment of the right to become vested with the legal title, if there should be no redemption.

4. The executor of the Ferguson estate assigned his interest, as purchaser at the foreclosure of the first mortgage, to McCreery, the complainant, on the 9th day of July, 1914. The right to redeem from the foreclosure sale expired on the 15th day of October, 1914. Between these dates, and on the 22d day of September, 1914, McCreery wrote Roff, the owner of the land, as follows:

"As you requested yesterday below is a statement of the mortgages. I bought the first mortgage of Mr. McLees, Ex. paid him $6,647.15 on July 9th. You can figure the interest due me to any time starting with July 9th. On the second $3,500 mortgage there is a balance due of $2,242.70 on this the interest is paid to March 28, 1914."

It is claimed that this letter caused Roff to believe that the foreclosure proceedings were not to be insisted upon, and led him to relax his efforts to raise the redemption money. How it could have been so construed is not apparent. But be this as it may, it is not a defense that can be urged in an action at law, such as this. If there were such deceit as equitably would still authorize redemption by Roff, his application therefor must be to a court of equity. *Gage* v. *Sanborn, supra.*

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

McQUILLAN *v.* AYER.

1. TRUSTS—VALIDITY—EXPRESS TRUST.

An express trust can be created only in the manner prescribed by the statutes of this State and may be created for the beneficial interest of any person or persons when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the statute limitations as to time. 3 Comp. Laws, §§ 8839, 8844, 8845, 8848.

2. SAME—DEEDS.

A purchaser from a trustee takes not only the legal title, but the beneficial title as well, when the conveyance is made rightfully and under the terms of the trust, or if made wrongfully, when the purchaser is ignorant of the violation of the trust.

3. SAME—GOOD FAITH—EQUITABLE TITLE.

A conveyance by the trustee ordinarily effects a complete transfer of the beneficial as well as the legal estate, and while the grantee is charged with notice of the limitations of the trustee's title, as contained in the instrument creating it, or of such limitations as may be actually known to him, there is no doubt that, under the statutes of this State, the trustee, under a deed that only describes him as trustee, can convey to one ignorant of the terms of the trust an absolute title both legal and equitable.

4. SAME—CONTRIBUTION—EQUITY—TAXES PAID.

Since he who seeks equity must do equity, a defendant who asks affirmative relief may be required to reimburse a complainant for taxes which the complainant was compelled in good faith to pay to protect her interest under a tax title purchase, though the tax title was void.

5. SAME—VOID TAX TITLE—REPAYMENT.

And the defendant was erroneously relieved of liability for taxes paid by the complainant before the date of his title deed, and during the seizin of his grantors.

Digitized by Google

Appeal from Ontonagon; Cooper, J. Submitted October 8, 1915. (Docket No. 24.) Decided December 22, 1915.

Bill by Annie McQuillan against Frederick Ayer for an accounting, contribution, etc. From a decree for complainant for partial relief she appeals. Modified.

A. E. Miller and *John E. Tracy*, for complainant.

M. J. Sherwood, for defendant.

On August 14, 1875, one Edmund M. Spalding located certain lands in Ontonagon county. In doing so he seems to have acted as trustee for himself and nine others, among whom was Dr. James McQuillan. Dr. McQuillan disposed of one-half of his interest to Felix O'Hegan, and Spalding issued to McQuillan and O'Hegan declarations of trust in the following language:

"Marquette, Aug. 24, 1875. This is to certify that Dr. James McQuillan is entitled to a one-twentieth (1/20) undivided interest in the following described lands, located in my name as trustee: S. E. ¼ of S. E. ¼ Sec. 9 & S. E. ¼ & S. ½ of S. W. ¼ Sec. 10 & S. ½of S. W. ¼ & S. W. ¼ of S. E. ¼ Sec. 11, township 50 N. of range 42 W., situated in Ontonagon county, State of Michigan, located Aug. 14, 1875. Edmund M. Spalding, Trustee."

The land was patented to "Edmund M. Spalding, trustee." It appears that Spalding, as trustee, never paid any taxes upon the property. The lands were sold for taxes for the years 1877 to 1881 to one James McCarthy, who purchased at the request of McQuillan, and later conveyed his interest to McQuillan. McQuillan purchased directly for the taxes of 1882 and 1883, and he or his assigns have continued to pay the taxes on the entire property from that time down to and including the year 1913. Complainant through mesne conveyance became the owner of the McQuillan interest in 1897. The O'Hegan interest passed to James

Digitized by Google

McQuillan in 1910 by devise, and was by him conveyed to complainant in 1913. The complainant, therefore, at the time of the filing of her bill, was the owner of an undivided one-tenth interest in said lands, according to the declarations of trust executed by Spalding. In the year 1899 Spalding executed a quitclaim deed covering the S. E. quarter of the S. E. quarter of section 9 to M. E. Asire. This deed was signed by Spalding as an individual. In 1902 Spalding conveyed the balance of the land by warranty deed to William O. Butler, signing the deed as an individual and as "Edmund M. Spalding, Trustee." Later, and in 1902, Butler acquired Asire's title to the 40 acres which had been conveyed to Asire by Spalding. In the same year, 1902, Butler, by warranty deed, conveyed all of said lands to defendant.

Complainant's bill is filed for the purpose of compelling defendant to convey to her the legal title to a one-tenth interest in said lands, and, further, to require defendant to repay to her nine-tenths of the taxes which she or her grantors have paid since 1885, together with interest thereon. She further prays for an injunction restraining the prosecution of a suit at law. To this bill of complaint defendant filed an answer by way of cross-bill seeking a decree to the effect that he be declared to be the sole owner in fee of all of said lands, and that complainant and all others claiming through or under her be enjoined from setting up any claim to said lands or any portion thereof. The record fails to disclose that either the defendant or his grantors, or any one of them, made any inquiry as to the nature of the trust under which Edmund M. Spalding located and held the lands in question. Complainant claims no title to the lands by virtue of the tax deeds, but insists upon her equitable right to be reimbursed for her expenditures in that regard to the extent of nine-tenths of the amount thereof, with in-

Digitized by Google

terest thereon. Upon the hearing a decree was entered quieting the title to the lands in question in the defendant, upon condition that he cause to be deposited with the registrar in chancery the amount of the taxes paid by complainant or her grantors subsequent to the date defendant acquired title. Defendant complied with this decree, and complainant has appealed.

BROOKE, C. J. (*after stating the facts*). Broadly, it is the claim of the complainant that the use of the word "trustee" after the name Edmund M. Spalding, in the patent to him from the government, was sufficient to put an intending purchaser upon inquiry as to the nature of the trust under which said lands were held by Spalding, and that the defendant, having failed to show that either he or his grantors made any such inquiry, should be held to hold said lands as to the one-tenth owned by complainant under the trust as they were held by Spalding. A large number of authorities are cited in support of this proposition, including the case of *Geyser-Marion Gold Mining Co.* v. *Stark*, 106 Fed. 558 (45 C. C. A. 467, 53 L. R. A. 684). With reference to these authorities it may be said that they measurably support the contention of the complainant. We think, however, that the question in issue is disposed of by a consideration of our own statutes and decisions. Under the statutes of this State an express trust can be created only in the manner prescribed by statute. Such a trust may be created for the "beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title." Subdivision 5, § 8839, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10679).

Section 8844, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10684), provides:

Digitized by Google

"Every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, in law and in equity, subject only to the execution of the trust; and the person for whose benefit the trust was created, shall take no estate or interest in the lands, but may enforce the performance of the trust in equity."

Section 8845, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10685), is as follows:

"The preceding section shall not prevent any person creating a trust from declaring to whom the lands to which the trust relates shall belong, in the event of the failure or termination of the trust, nor shall it prevent him from granting or devising such lands, subject to the execution of the trust; and every such grantee shall have a legal estate in the lands, as against all persons except the trustees and those lawfully claiming under them."

Section 8848, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10688), provides:

"When an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees, without notice, and for a valuable consideration."

We think it clear that under the law of this State a purchaser from a trustee takes, not only the legal title, but the beneficial title as well, when the sale by the trustee is made rightfully and under the terms of the trust, or, if made wrongfully, when the purchaser is ignorant of the violation of the trust. 39 Cyc. p. 374, and cases cited.

A conveyance by the trustee ordinarily effects a complete transfer of the beneficial as well as the legal estate. *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264. While it is clear that one purchasing from a

Digitized by Google

trustee is bound to take note of the limitations of the trustee's title, as contained in the instrument creating the trust, or of such limitations as may be actually known to him, there is no doubt that under our statues, where the deed runs to one as a naked trustee, said trustee can convey to one ignorant of the terms of the trust an absolute title both legal and equitable. In the case at bar the only notice to the defendant or his grantors of the fact that others than Spalding were interested in the lands was contained in the use of the word "trustee" in the granting clause in the patent.

The declaration of trust upon which complainant relies was unrecorded, and the record is barren of proof that either defendant or his grantors had any actual notice thereof, nor does the record show that in disposing of the lands Spalding was, in fact, guilty of any breach of trust. For aught that appears, he may have had the right under the terms of his trust to dispose of the lands held by him; he to account for the proceeds thereof to those interested with him in the lands.

Counsel for complainant say:

"If complainant has any rights in the property under her trust certificate, she is entitled to contribution for taxes paid, under the doctrine of liability of one cotenant to another. If she has no rights under such certificate, she is nevertheless entitled to reimbursement under the doctrine of liability of the owner of property to one who has paid the taxes in good faith claiming title. Under the first doctrine the contribution should be nine-tenths of the taxes paid. Under the second doctrine the reimbursement should be of the whole amount."

It will be remembered that the learned circuit judge held that complainant had no rights in the property itself by virtue of the trust certificate, and with this holding we agree. He held, however, that the defendant should pay the taxes paid by the complainant since

Digitized by Google

defendant acquired title to the lands. Exactly upon what theory the defendant was held chargeable with taxes paid after he acquired title, and relieved from the payment of those paid while the title was in his grantors, the record does not disclose. Defendant is in a court of equity asking affirmative relief against complainant. In our opinion, the maxim, "He who seeks equity must do equity," is here applicable. There can be no doubt that the payment of the taxes by complainant and her grantors from the year 1887 down inured to the benefit of the estate now owned by the defendant. The fact that those taxes were paid by the complainant and her grantors, not as cotenant, but in reliance upon void tax titles, does not, in our opinion, affect the equities. In the case of *Sanborn Co.* v. *Alston*, 153 Mich. 456 (116 N. W. 1099), this court said:

"The name given to the title acquired by the tax purchaser under the provisions of the law is immaterial. Whether we call the title absolute or conditional, he has a title which it is his right to protect by payment of subsequent taxes, and, when the original owner demands a reconveyance from him, he ought in justice and equity to be compelled to pay those taxes which the purchaser has been compelled to pay, or otherwise lose his title or lien. * * * It is also held that, where a party pays the taxes in good faith, claiming title, but having none, he is entitled to a reimbursement out of the land. *Kemp* v. *Cossart*, 47 Ark. 62 [14 S. W. 465]; *Goodnow* v. *Moulton*, 51 Iowa, 555 [2 N. W. 395]."

The stipulation contained in the record fixes the amount of taxes paid by the complainant or her grantors, together with interest thereon, at the sum of $1,729.30. Under the authority of *Sanborn Co.* v. *Alston*, *supra*, we are of opinion that the decree should be amended, compelling defendant to pay this amount,

Digitized by Google

instead of the sum of $934.90, fixed by the court below.

With this modification, the decree is affirmed, with costs to appellant.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

HECHT v. EBERS.

PRINCIPAL AND AGENT—CONTRACTS—BREACH.

In reviewing a judgment for plaintiff in an action for breach of a contract of sale of a quantity of apples, the charge of the court, submitting to the jury the question of defendant's son's agency to enter into the contract, *held*, to be warranted by the evidence and to cover the issue in a sufficient manner.

Error to Kent; Perkins, J. Submitted October 7, 1915. (Docket No. 12.) Decided December 22, 1915.

Assumpsit by Isaac Hecht against Frank Ebers and Avery Ebers, before a justice of the peace, for breach of a contract of sale. From the judgment rendered, an appeal was taken to the circuit court, in which judgment was rendered for plaintiff against defendant Frank Ebers and in favor of defendant Avery Ebers. Defendant Frank Ebers brings error. Affirmed.

Digitized by Google

Taggart & Taggart, for appellant.

G. A. Wolf, for appellee.

BROOKE, C. J. Plaintiff is a retail fruit dealer located in the city of Grand Rapids. Defendant and appellant, Frank Ebers, is a fruit grower living near said city. Defendant Avery Ebers is the son of Frank Ebers, and actively interested with his father in the production and sale of fruit. Some time in the latter part of September, 1913, the son, Avery Ebers, inquired of the plaintiff if he wished to purchase some apples. Upon being informed that he was in the market a conversation ensued, which resulted in a written contract in the following terms:

"Sold to I. Hecht about 500 bushels No. 2 apples all clear from worms at 30 cents per basket. Delivered 248 Indiana St. Paid $5.00.
[Signed] "AVERY EBERS."

This contract was prepared by Avery Ebers, executed by him, and he received $5, paid on account by the plaintiff, Hecht. At the time this contract was made a duplicate of it was made by Avery Ebers, except that the term "No. 2" was omitted. Upon this contract two or three loads of apples were delivered by Avery Ebers, totaling 139 bushels. Plaintiff made a demand upon defendant Frank Ebers to deliver the balance of the apples, but no further deliveries were made. Plaintiff brought suit in justice's court for a breach of contract. An appeal having been taken from the judgment there rendered, to the circuit court, a judgment was rendered against defendant Frank Ebers in the sum of $146.80, and in favor of defendant Avery Ebers. Defendant Frank Ebers now reviews that judgment in this court.

Upon the trial plaintiff showed that the defendants were father and son, engaged in producing and selling fruit, and that he had on several occasions bought from

Digitized by Google

one or the other of them fruit which had been delivered. He showed that the wagon from which defendant sold fruit was labeled "Frank Ebers & Son," and that a similar sign was painted upon the barn located upon the farm owned by defendant Frank Ebers. Both defendants testified that sales of fruit were made indiscriminately by either. It was shown that defendant Frank Ebers, who claimed to be the sole owner of the fruit, had knowledge of the fact that his son, Avery Ebers, had entered into a contract with the plaintiff for the delivery of certain apples. He claimed, however, that the contract entered into was for apples "table sorts," instead of apples "No. 2" in quality. He denied the authority of his son to enter into a contract binding him to deliver in the future any specified quantity of apples of a specified quality.

The controlling question presented under the proofs was as to the authority of Avery Ebers to bind his father by the contract in question. Upon the question of agency the learned circuit judge charged the jury as follows:

"On the subject of agency you will take into consideration all the facts and circumstances in the case, the relation of the parties, what they did, their usual course of dealings, what was done with the proceeds, what instructions were given, if any, the conduct of the parties generally, and the nature of the transaction. * * *

"If you find that the son Avery had general authority from his father to make a contract like the one in question to sell apples, the product of the defendant Frank Ebers' farm, then it would follow that the father would be bound by the acts of his son in making such a contract. It is immaterial in this case whether the memorandum was signed by Avery Ebers alone, or by his father, or whether Avery signed his father's name by him as agent. Earnest money was paid, $5, on the making of this memorandum; a part of the contract was carried out; 139 bushels of apples

Digitized by Google

were delivered. You have heard the testimony in the case as to what was done by both defendants, Avery Ebers and his father, Frank Ebers, in carrying out this contract, and what was done with the proceeds of the apples that were actually delivered. From all of these facts and circumstances, you are to say whether Avery Ebers had general authority to make the contract. If you find that he had, then Frank Ebers is liable in this action for the acts of his agent Avery. Of course, if you should find that Avery had no authority from his father to make this contract, then Avery would be responsible himself for a failure on his part to perform it. * * *

"In this case the burden of proof rests upon the plaintiff to establish his claim by a preponderance of the evidence. * * * If you are satisfied by a preponderance of the evidence that Avery Ebers was acting for and in behalf of his father, and as his father's general agent in making this contract with the plaintiff, then your verdict should be against Frank Ebers for the amount you may ascertain under the evidence and the instructions I have given you to be the plaintiff's damages. If you are not satisfied that he was such agent, then your verdict will be no cause of action against Frank Ebers, but your verdict will be against Avery Ebers for a like amount alone."

The first eight assignments of error relate to the receipt or exclusion of evidence. These have been examined with care, but we do not find them well founded.

Five assignments of error are based upon the refusal of the court to give the defendant's requests to charge. Under the evidence in the case we are of opinion that they were properly refused.

The remaining assignments are based upon alleged erroneous instructions to the jury. The charge, as quoted above, on the question controlling the issue, in our opinion properly stated the law of the case and adequately guarded the rights of the defendant. There was ample testimony in the case to support the finding of the jury that Avery Ebers had general authority

Digitized by Google

from his father to make the contract in question. An extended discussion of the several assignments of error would be profitless.

The judgment is affirmed.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

SAUER v. McCLINTIC-MARSHALL CONSTRUCTION CO.

1. PLEADING—SALES—CONTRACTS—BREACH.

Where, in a suit for a breach of a contract of sale, the amended declaration averred that plaintiffs duly and seasonably furnished to the defendant complete information for detail drawings as required by the contract and duly and seasonably kept, observed, and performed all of the terms and conditions of said contract on their part to be kept, observed, and performed, a demurrer was rightly overruled, particularly after the first trial wherein evidence covering the allegation was offered and received so that the defendant understood the claims made by plaintiff: the objection that the declaration stated the conclusions of the pleader was not sufficient and is held to be over technical.

2. DAMAGES—EVIDENCE—MARKET VALUE.

The legal duty of the buyer to minimize his damages so far as possible does not deprive him of his right to recover in case he made no inquiries about market values before he purchased, but his maximum recovery should not exceed the amount to which he could have reduced his damages if he had sought for and obtained such bids.[1]

[1]The duty to prevent or reduce damages on breach of contract of sale or purchase is discussed in note in 52 L. R. A. 259.

Digitized by Google

3. SAME—VERDICT—SALES—BREACH.

Held, also, that the amount of the verdict was not excessive, and that the award of less than certain witnesses testified the difference between market price and contract price amounted to was sufficiently justified by plaintiff's evidence.

4. SAME.

The measure of damages for failure to deliver steel ordered was the difference between the contract price and market price at the time and place of delivery.

5. SAME—EVIDENCE FIXING AMOUNT OF MARKET PRICE.

Taking into consideration the amount of the verdict, which was less than the difference between the contract price and the price paid by plaintiffs for the steel, the reception of evidence offered by the plaintiffs as to the bids that they received about the time of entering into the contract was not prejudicial.

Error to Washtenaw; Kinne, J. Submitted October 13, 1915. (Docket No. 64.) Decided December 22, 1915.

Assumpsit by Charles A. Sauer and another against the McClintic-Marshall Construction Company for breach of a special agreement. Judgment for plaintiffs. Defendant brings error. Affirmed.

Cavanaugh & Burke, for appellant.

Robert E. Bunker and *Arthur Brown*, for appellees.

BROOKE, C. J. Upon a former trial of this case a judgment in favor of plaintiffs in the sum of $1,026.34, which included interest, was reversed, for two reasons:

First. Because the declaration was wanting in specific allegations that plaintiffs furnished to defendant "complete information for detail drawings" under the following clause of the contract:

Digitized by Google

"All material is to be delivered f. o. b. cars in Ann Arbor, within eight to ten weeks after receipt of complete information for detail drawings."

Second. Because the verdict was held to be against the weight of the evidence, and contrary to law upon the question of the measure of damages. Upon this point, speaking through Mr. Justice STEERE, we said:

"The contract price of the material to be furnished by defendant was $1,450. Plaintiffs bought the same material of the Toledo Iron & Wire Company at an increased price of $1,002, without obtaining quotations from other competitors or making any inquiries elsewhere as to the condition of the market or possibility of securing a more favorable price. The contract required 34 tons of steel, and it was shown that such steel could have been bought in the open market during August, September, and October of that year at an advance of $8 per ton, and the usual price for quick delivery was about $4 per ton extra. As the testimony stands in this record, it appears by the weight of evidence, and in some particulars by the undisputed evidence, that plaintiffs made no such general inquiry and effort, and exercised no such diligence to secure the material at the fair market price, and thus diminish the damages, as the law requires, and that, had they done so, a substantial reduction from the price paid might, and probably would, have been obtained. In that particular we conclude that the verdict was against the weight of evidence and contrary to law." *Sauer* v. *Construction Co.*, 179 Mich. 618 (146 N. W. 422).

To meet the first ground plaintiffs filed an amended declaration with reference to performance, as follows:

"And the said plaintiffs aver that they duly and seasonably furnished to said defendant complete information for detail drawings as in and by said contract they were required to do, and duly and seasonably kept, observed, and performed all of the terms and conditions of said contract on their part to be kept, observed, and performed."

Digitized by Google

Defendant interposed a demurrer to the amended declaration, which was overruled by the circuit court and an exception was duly taken.

The first error discussed by appellant relates to the overruling of the demurrer. The ground of demurrer is stated as follows:

"It appears from said declaration that as a condition precedent to any liability on the part of defendant the plaintiffs were under obligation to furnish to defendant complete information for detail drawings; and it is nowhere alleged in said declaration, except in the form of a legal conclusion, that said information was ever furnished to the defendant, and said declaration wholly omits any allegation respecting the time, place, or manner of the performance of said condition precedent on the part of the plaintiffs, and wholly omits to allege what, if anything, plaintiffs did which constituted a performance on their part of said condition precedent; and the attempt to allege any such performance consists wholly of the allegation of a legal conclusion, and wholly omits to state any facts representing such performance."

In our former opinion at page 628 of 179 Mich. (at page 425 of 146 N. W.), we said:

"Defendant agreed to deliver all material at Ann Arbor f. o. b. within 8 or 10 weeks after receipt of the information desired, and had offered to deliver within 5 weeks for $200 additional price. Correspondence on the subject not resulting in obtaining all the information desired, defendant's agent visited plaintiff's office on August 6th, and from there went to the architect's office. As a result the defendant was then furnished with complete information—just how or by whom is unimportant. The condition precedent imposed upon plaintiffs was complied with in all essentials within a reasonable time. Assuming that after this it was their duty to see the defendant's shop drawings for its workmen were approved by the architect, this was done by August 19th, which yet gave defendant the maximum contract time before the building was to be completed. Defendant had already received drawings for the structural steel on July 6th, and the architect's plans

Digitized by Google

on July 23d. We find nothing in the contract to suggest that it was made with reference to subsequent market conditions affecting defendant's ability to perform, and the testimony shows it was possible to perform it within a month after receiving the order."

In view of the fact that the case had already been tried once and evidence as to the performance of the condition was known to defendant, and had been passed upon by this court, we think that the objection to the declaration as amended is over-technical and that the demurrer was properly overruled. *Hanselman* v. *Carstens*, 60 Mich. 187 (27 N. W. 18).

The second assignment of error deals with the amount of the recovery, which it is urged is still excessive, and with the evidence touching the measure of damages, and to the charge of the court in relation thereto. Upon this trial plaintiffs' recovery was $651.45, which included interest for about three years. Upon the second trial counsel for plaintiffs admitted that he could not furnish testimony showing that inquiries had been made as to the price from others than the company from which it bought at or about the 27th day of September. He said:

"I am not going to be able to offer any testimony as to making inquiries of others about the 27th day of September, but I am going to ask leave to show that we had figures from other parties, and it has a tendency to prove what the market price was; and, furthermore, if we bought at the market price of that material, if we paid no fancy price, then we have complied with the rule which requires us to make an effort to reduce the damages."

He was permitted, however, to produce evidence of the amount of competitive bids received for this steel from other concerns in July before the contract was awarded. Upon the question of the measure of damages, plaintiffs examined Mr. Frank Powell, who, under the name of the Toledo Iron & Wire Works,

Digitized by Google

actually furnished the steel to the plaintiffs. He testified that he charged plaintiffs $60 a ton for the steel, and that that was its market price at that time. (The latter part of September, 1912.)

Defendant introduced the testimony of Mr. Geo. H. Danforth, structural engineer for the Jones & McLaughlin Company, to the effect that at that time steel of this character was worth about $52 a ton. Likewise the testimony of Mr. Clyde Taylor, employed by structural steel manufacturers, who fixed the value at that time at $55 per ton. Also the testimony of Mr. L. A. Walker, engineer for defendant company, who fixed the value in the latter days of September at $50 per ton. Under all this testimony it is the claim of the defendant that the jury returned a verdict of at least $5 per ton, or $170, in excess of the true measure of damages, and that as to such excess the verdict is against the weight of evidence, and contrary to law. In reaching this conclusion, defendant ignores the testimony of Mr. Powell, who actually sold the steel, and who testified to having made contracts at about the same time, at the same figure, for steel of a like quality and quantity.

Defendant requested the court to charge that the plaintiffs could not recover to exceed $12.50 per ton, that being the amount of the highest estimate of the value of the steel when it was ordered on September 27th given by any witness except Powell, who actually sold the steel. This request was refused and the court charged:

"If you find under the evidence and the instructions I have given you that the plaintiffs are entitled to recover, they are entitled to recover as damages whatever sum they necessarily paid for the structural steel in excess of the sum they agreed to pay the defendant therefor, * * * provided that they purchased the said structural steel * * * at the best or lowest prices obtainable under all the circumstances of the case."

Digitized by Google

An analysis of the verdict would seem to indicate that the jury determined that the best or lowest price obtainable was $60 per ton, and not $55 a ton, or any less sum, as testified to by the various witnesses on behalf of defendant.

In holding as we did in our former opinion that it was the legal duty of the plaintiffs to minimize the damages to defendant as far as possible through inquiries of different manufacturers, in order that the steel should be obtained at the lowest possible price, it was not our intention to prevent recovery on the part of the plaintiffs in case no such inquiries had been made, but to compel plaintiffs to accept such a judgment as the evidence showed he would have been entitled to recover in case they should have performed their legal duty by securing the best price obtainable at the time the steel had to be purchased. The measure of damages for failure to deliver steel was the difference between the contract price and the market price at the time and place of delivery. *Galinski* v. *Thomas*, 178 Mich. 589 (146 N. W. 191).

Error is assigned upon the action of the court in admitting testimony as to bids of others received by plaintiffs in July. While we are of opinion that the evidence was inadmissible, it is apparent from the amount of the verdict it was without prejudice to defendant. The recovery was in fact more than $400 less than the amount actually paid by the plaintiffs to the Toledo Iron & Wire Works.

We discover no reversible error, and the judgment is therefore affirmed.

The claim made by counsel for plaintiffs that this is a proper case for the assessment of damages as for a vexatious appeal has been considered, but we believe it to be without merit.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

BROWN *v.* TOWNSHIP OF BYRON.

1. MUNICIPAL CORPORATIONS—TOWNSHIPS—HIGHWAYS.

   Where plaintiff sustained injuries to his person in using a temporary road or turnout to cross an interurban track, it being out of repair, and the township in which it was situated was not alleged to have constructed the temporary way, or participated in the establishing of the same, which was not made a public highway by dedication or by statutory proceedings, the trial court did not err in sustaining a demurrer to the declaration, since the liability of a township for injuries sustained in the highway is limited by statute to public ways. Act No. 283, Pub. Acts 1909 (2 How. Stat. [2d Ed.] §§ 2462, 2174, 2179.)

2. SAME—STATUTES—CONSTRUCTION.

   The liability of municipalities for injuries upon highways is purely statutory and cannot be enlarged by construction.

3. SAME.

   Public highways can be established in two ways only under the statutes of this State: (1) by proceedings instituted by the commissioner of highways of a township upon written application of freeholders, notice, etc.; (2) by user.

4. SAME—PERSONAL INJURIES.

   One who travels outside of the limits of a legally established highway must be held to do so at his peril, so far as his statutory remedy against the township is concerned, even though the municipality has, without legal authority, alone or in conjunction with others, constructed a temporary way.

Error to Kent; Perkins, J. Submitted October 12, 1915. (Docket No. 57.) Decided December 22, 1915.

Case by Edward Brown against the township of Byron and others for personal injuries. From an order sustaining a demurrer to plaintiff's declaration he brings error. Affirmed.

Digitized by Google

Nichols & Shaw, for appellant.

Edward N. Barnard, for appellees.

Plaintiff in his declaration sets out that the defendant township for more than 10 years prior to August 21, 1913, maintained a certain highway within the limits of said township; that the defendant, the Michigan Railway Company, on said date was the owner of an interurban railway which passed through said township, and which railway intersected said highway in said township at a point near the east boundary line of said township of Byron; that the defendant, the Michigan Railway Engineering Company, was on said date engaged in the building and construction of said railway at said place in said township; that previous to said date all three defendants during the construction of the railway, at the point where said interurban line crosses the highway running east and west between sections 24 and 25 of said township, constructed a temporary road across said interurban line for the use of public travel; that at the point where said interurban railway crosses said highway, it became and was necessary to build a viaduct or bridge over said interurban railway; that during the construction of said interurban railway and of said viaduct, it also became and was necessary for the traveling public and pedestrians and persons driving teams and vehicles in passing along said highway to use said temporary road around said intersection, which said road was built and laid out by the said defendants as aforesaid; that said road so laid out extended from said highway around said place of intersection to a point north of said intersection a distance of 300 feet from said highway, at which place said temporary roadway crossed said interurban right of way; that thereupon it became the duty of defendants to keep said temporary roadway extending around

Digitized by Google

the said intersection of said highway and said interurban right of way, as aforesaid, in reasonable repair, and in a condition reasonably safe and fit for public travel; that, disregarding said duty, the defendants on said August 21, 1913, permitted said temporary way to become out of repair and in a condition unsafe and unfit for public travel, and permitted a large hole, to wit, 3 feet in diameter and 2 feet deep, to remain along the line of said temporary roadway at a point 300 feet north of said intersection of said highway with said interurban railway, and 20 feet west of said interurban railway, and within the right of way of said interurban railway, and particularly that the defendant township of Byron, failing in its duty, negligently and carelessly constructed said temporary roadway around said intersection in such manner that the same was unsafe and unfit for public travel, and permitted the same to remain in such condition; and that plaintiff, using said temporary way with due care on his part, on said date received certain injuries for which recovery is sought. To this declaration defendant township of Byron interposed a demurrer in the following terms:

"(1) It is not alleged or shown by said declaration that the plaintiff sustained bodily injury or other damage upon any public highway or street within the corporate limits or jurisdiction of the said township of Byron.

"(2) It is not alleged or shown by said declaration that the construction of the temporary road referred to in said declaration was made by or under the municipal authorities of the said township of Byron.

"(3) The said township of Byron had no lawful municipal authority to construct the temporary road for the purposes for which it was alleged that said temporary road was constructed."

The court having sustained the demurrer, a request was filed by counsel for plaintiff that reasons be given by the trial court for sustaining the demurrer. The

Digitized by Google

learned circuit judge thereupon filed the following reason:

"I do not believe that a township is liable under the statute for injuries sustained outside the established portion of the highway."

Plaintiff in this court now reviews the order sustaining the demurrer.

BROOKE, C. J. (*after stating the facts*). Plaintiff claims that the township became liable for injuries sustained by him upon this temporary highway, which he claims is a public highway within the meaning of the statute, for two reasons:

(1) Because it was connected with a public highway in such a way as to become part of it, the opening and terminus being the public highway.

(2) Because it was held out to the public as a public highway, and the public were invited and induced to use it as a public highway.

Many authorities are cited by plaintiff, alleged by him to support his contention. With reference to those cited from this State, it is sufficient to say that the question, though presented in the recent case of *Hayden* v. *Township of Bangor*, 182 Mich. 601 (148 N. W. 691), was undetermined, for the reason that plaintiff's recovery was there held to be barred upon the ground of contributory negligence. We have frequently held that the liability of municipalities for injuries upon highways is purely statutory, is in derogation of the common law, and cannot be enlarged by construction. See *Miller* v. *City of Detroit*, 156 Mich. 630 (121 N. W. 490, 132 Am. St. Rep. 537, 16 Am. & Eng. Ann. Cas. 832), and cases cited. The statute under which plaintiff seeks to recover limits recovery to bodily injuries sustained—

"upon any of the public highways or streets in this State, by reason of neglect to keep such public high-

Digitized by Google

ways or streets, and all bridges, sidewalks, crosswalks and culverts on the same in reasonable repair, and in condition reasonably safe and fit for travel." 2 How. Stat. (2d Ed.) § 2462.

Public highways can be established in two methods only under the law of this State: (1) By proceedings instituted by the commissioner of highways of a township upon written application of freeholders and notice to landowners to be affected, appraisement of damages, and the making of a proper record in the office of the township clerk. 2 How. Stat. (2d Ed.) §§ 2174 to 2179. These proceedings must conform strictly to statute, or they are void. *Price* v. *Stagray*, 68 Mich. 17 (35 N. W. 815); *Dixon* v. *Commissioner of Highways*, 75 Mich. 225 (42 N. W. 814). By the second method public highways may be established by user. 2 How. Stat. (2d Ed.) § 2193. It is clear that at the point where plaintiff was injured the defendant township of Byron had not established a "public highway" within the meaning of that term as used in the statute upon which liability is predicated. We are of opinion that one who travels outside of the limits of a legally established highway must be held to do so at his peril, so far as his statutory remedy against the township is concerned, even though the municipality has, without legal authority, either alone or in conjunction with others, constructed a temporary way for his accommodation.

The judgment is affirmed.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

CLARK v. NORTH AMERICAN UNION.

1. INSURANCE—FRATERNAL BENEFICIARY ASSOCIATIONS—EVIDENCE—TRIAL—DIRECTING VERDICT.

Where the testimony of defendant's examining physician showed, on cross-examination, at the trial of an action on a benefit certificate, although he had stated affirmatively in his direct examination that decedent answered a question in her application relating to pregnancy by "No," that he did not recollect definitely actually asking the question, the trial court did not err in submitting the issue of decedent's alleged fraud to the jury.

2. SAME—NEW TRIAL—WEIGHT OF EVIDENCE.

Held, also, on motion for a new trial, that the verdict was not so opposed to the weight of the evidence as to require the court to grant a new trial.

Error to Muskegon; Barton, J. Submitted October 13, 1915. (Docket No. 80.) Decided December 22, 1915.

Assumpsit by Fred A. Clark against the North American Union on a benefit certificate. Judgment for plaintiff. Defendant brings error. Affirmed.

Cross, Vanderwerp, Foote & Ross (*Clarence V. Donovan*, of counsel), for appellant.

Turner & Turner, for appellee.

BROOKE, C. J. For a statement of the facts involved in this case reference is made to *Clark* v. *North American Union*, 179 Mich. 131 (146 N. W. 336), where it will be found reported. We there held that the evidence of the examining physician as to the asking and answering of a controlling question was such as to present an issue for the determination of the jury. The case has now been tried a second time, and, the ques-

Digitized by Google

tions of fact having been determined by the jury in favor of the plaintiff, defendant has removed the case to this court for review.

The examining physician was again placed upon the stand by the defendant, and an elaborate examination and cross-examination ensued. The evidence upon the first trial will be found set forth, in part, in the earlier opinion. We quote briefly from the evidence upon the second trial.

Upon direct examination:

"*Q.* Do you have a very distinct recollection of that examination?

"*A.* No. * * *

"*Q.* I suppose you have a great many examinations to make, and blanks of this kind to fill out, and can't carry them all vividly in your mind.

"*A.* No.

"*Q.* But let me ask you this: Is it your practice to write down dates and answers and everything of that sort truthfully and in accordance with the fact?

"*A.* Yes, sir. * * *

"*Q.* Let me ask you, Doctor, in making out this certificate, did you intentionally make any misstatement of any kind?

"*A.* No, sir.

"*Q.* Or write down anything different from what you understood the fact to be?

"*A.* No, sir.

"*Q.* But at this date you can't recall, I suppose, the asking of specific questions or the return of specific answers?

"*A.* It isn't customary to keep records of those things, because that is a record, and the physician can't remember five years very well, distinctly. * * *

"*A.* (To the Court.) Now, your honor, this paper was—is a paper that I examined the deceased, and every question there was asked upon honor, except those of minor importance, and whatever the answer was on this blank is true, and that is all I can say. * * *

"*The Court:* Look at that blank.

"*Mr. Cross:* Here is the question I speak of.

Digitized by Google

"*A.* Your honor, if the answer is there, I certainly asked it.
"*Q.* Well, look at it.
"*A.* I did look at it. I know what those questions are better than any man in this courtroom.
"*Q.* Certainly.
"*A.* I filled out hundreds of these blanks.
"*Q.* Are you able to say now that you propounded that question to Effie B. Clark?
"*A.* I certainly asked that question.
"*Q.* And she certainly answered it 'No.'
"*A.* The answer is there.
"*Q.* Well, look at the answer.
"*A.* Yes, sir. That was my testimony at first."

On cross-examination:

"*Q.* Now, you don't have any recollection now whether the question was asked Mrs. Clark as to whether she was pregnant or not, have you?
"*A.* I don't remember.
"*Q.* And you don't know as you asked that question, do you?
"*A.* I don't remember now whether I asked it; no, sir. * * *
"*Q.* Now, some of these questions are put down—they are answered by the party making the examination, without questions to the party you are examining; isn't that true?
"*A.* Certainly, there are some of them.
"*Q.* And you don't pretend to remember whether that was the fact in regard to the question of pregnancy, do you?
"*A.* I don't remember."

There is much more of this witness' examination and cross-examination in the record, but the foregoing will serve as a fair sample. No other testimony was offered by the defendant tending to show that the question was asked by the physician and answered by the deceased. Error is assigned by the defendant upon the refusal of the court to direct a verdict at the close of the testimony, and after verdict upon the refusal of

Digitized by Google

the court to set aside the same upon the ground that it was against the great and overwhelming weight of the evidence. These are the only questions raised upon the present record.

We are of opinion that the testimony given upon the last trial by the examining physician, taken as a whole, does not present a situation essentially different from that considered by us upon the former hearing. Under the authority of *Wilson* v. *Royal Neighbors of America,* 139 Mich. 423 (102 N. W. 957), we believe the case was properly submitted to the jury.

We do not think that it can be said that the verdict of the jury is so clearly against the weight of the evidence as to require us to overrule the action of the trial judge in denying a new trial upon that ground. Upon the one hand, every person is presumed to have read that which he has signed; and, upon the other hand, there stands the testimony of the physician, who, under cross-examination, gave evidence which, to say the least, makes it doubtful whether he actually asked the question relative to pregnancy, or whether the deceased fraudulently and untruthfully answered it.

The judgment will stand affirmed.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

AMERICAN BRASS CO. *v.* EMERY.

CORPORATIONS—DIRECTOR'S LIABILITY—REPORTS—NEGLECT TO FILE.

As the statutory liability of corporate directors for the debts contracted since the filing of the report preceding the default or refusal to file the annual report did not, prior to the amendment of 1915 (Act No. 142), extend to an indebtedness arising after default, the directors of a corporation were not liable for an indebtedness contracted in 1911 after noncompliance with the statutory requirements in and for the previous year, though the time of incurring the same preceded another default; no report being filed in 1909, 1910, or 1911. Act No. 137, Pub. Acts 1907 (4 How. Stat. [2d Ed.] § 9543).

Error to Muskegon; Sullivan, J. Submitted October 14, 1915. (Docket No. 91.) Decided December 22, 1915.

Assumpsit by the American Brass Company, a foreign corporation, against John G. Emery, Jr., and others, to enforce the statutory liability for failure to file the annual report of a corporation, of the directors of the American Electric Fuse Company. From an order sustaining a demurrer to the declaration, plaintiff brings error. Affirmed.

Earl R. Stewart and *Colin P. Campbell* (*Thomas P. Hardy*, of counsel), for appellant.

Cross, Vanderwerp, Foote & Ross (*Norris, McPherson, Harrington & Waer*, of counsel), for appellees.

BROOKE, C. J. The facts in this case are exactly like those in the case of *Continental, etc., Bank* v. *Emery*, 178 Mich. 612 (146 N. W. 303), with the following exceptions: The plaintiff is different, and whereas

Digitized by Google

in the *Continental Case* the indebtedness was incurred between April 20, 1911, and June 29, 1911, the indebtedness in the case at bar was incurred, as it appears from the amended bill of particulars filed in the case, in large part prior to the 10th day of March, 1911; a considerable amount of said indebtedness having been incurred during the months of January and February, 1911. A demurrer was interposed on behalf of the defendants, which was sustained by the learned circuit judge.

Plaintiff has removed the case to this court for review, under the claim that the decision in the *Continental Case* is not controlling, for the reason that the indebtedness in the case at bar was incurred prior to March 10, 1911, whereas in the *Continental Case* the indebtedness was incurred subsequent to that time. The record in the case at bar, as well as in the *Continental Case,* shows that the corporation, the American Electric Fuse Company, failed to file any annual report during the months of January and February, for the years 1909, 1910, and 1911. In the *Continental Case* the debts were contracted after the failure of the corporation to file its 1911 report. In the case at bar the debts were contracted after the failure of the corporation to file its 1910 report. We are unable to distinguish the two cases upon principle. In the *Continental Case,* the court, speaking through Mr. Justice OSTRANDER, said:

"Every one is presumed to know when reports ought to be made, and every one may know whether there is a default in making them. If after a default has occurred, and the directors have become liable for all existing debts of the corporation contracted during the year, a person chooses to deal with the corporation and become its creditor, his case presents no moving reason for enlarging what seem otherwise to have been the limits of a statutory liability of directors."

The legislature, apparently for the purpose of meet-

Digitized by Google

ing the decision in the *Continental Case*, amended section 12 of the act of 1903 (Act No. 232, Pub. Acts 1903), as amended, in the following manner (Act No. 142, Pub. Acts 1915):

"And any director of such corporation so in default, who has neglected or refused to join in the making of such report shall be liable for all the debts of such corporation contracted *during the period of such neglect or refusal.*"

We are of opinion that the case at bar is controlled by our decision in the *Continental Case*, and the judgment sustaining the demurrer is, therefore, affirmed.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

FEIST *v.* ROOT.

1. SALES—EVIDENCE—DIRECTING VERDICT—HUSBAND AND WIFE—CONTRACTS—PRINCIPAL AND AGENT.

Defendant, a music dealer, who had been in business associated with his wife, was not, as a matter of law, entitled to a directed verdict because the music for the price of which plaintiff brought action had been originally charged to his wife, who ordered it, the business belonging in fact to him, and the goods becoming a part of his stock, where there was evidence that he made payments on the account so as to reduce it below the price paid and he had informed an attorney, that had the account for collection, that he had received the goods and would pay for them, and he had not returned the merchandise to plaintiff, claiming, in explanation thereof, that they were negotiating concerning the claim, etc. The question was for the jury.[1]

[1]The validity of husband's express promise to pay debt previously contracted by wife is discussed in note in 7 L. R. A. (N. S.) 1048.

Digitized by Google

2. SAME—FRAUDS, STATUTE OF—WRITTEN CONTRACT.
Any subsequent promise of defendant to pay a debt which in fact was his wife's was void if it was not in writing, under the statute of frauds.

3. SAME—TRIAL—CHARGE.
Nor did the trial court err in charging the jury, as to this phase of the defense, that if the goods were not purchased by authority of defendant or accepted by him as his goods, he would not be bound by any promise to pay for them, unless he made it in writing and for a valuable consideration.

4. TRIAL—CHARGE.
No error was committed by the court in declining to give requests to charge as framed by counsel for the defendant, if the subject was covered by the general instructions.

5. SALES—CONSIDERATION.
And if the goods were purchased for and accepted by defendant, there was no failure of consideration, inasmuch as he had theretofore received the music ordered.

6. APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW.
In the absence of exceptions, improper argument of plaintiff's counsel is not reviewable on writ of error.

Error to Washtenaw; Kinne, J. Submitted October 13, 1915. (Docket No. 65.) Decided December 22, 1915.

Assumpsit in justice's court by Leo Feist against Frank M. Root for goods sold and delivered. From a judgment for plaintiff defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Edward B. Benscoe (*Frank A. Stivers*, of counsel), for appellant.

Cavanaugh & Burke, for appellee.

PERSON, J. This action was brought to recover a balance of $122.17 and interest, claimed by the plain-

Digitized by Google

tiff to be due him on account. The plaintiff is a publisher of music in New York City, and the defendant, at the time the account accrued, was a dealer in music in Ann Arbor. The account consists of a list of 24 items, charged against the defendant, beginning in August, 1908, and ending in November, 1909; and 9 items of credit given at various times between October, 1908, and September, 1909. The plaintiff recovered judgment, first in the justice's court, and then on appeal, each time for the full amount of the claim. The controversy is over one item of this account whereby defendant is charged $192.04, as of September 1, 1908, for a certain publication of music, known as the "Peter's Edition." This music was ordered by defendant's wife, when the two were in New York City making purchases in the fall of 1908. At the time defendant's business in Ann Arbor was conducted under the name of "Root's Music House." The business belonged to Mr. Root, but both he and his wife were actively engaged in the management of it. It is claimed by the plaintiff that the music was purchased for Root's Music House, that it went into defendant's general stock, that the wife had authority to make the purchase for him, and that he acquiesced in and ratified it. The defendant claims that this "Peter's Edition" was purchased by the wife on her personal credit, and that it should not be charged to him.

It is assigned as error that the circuit judge refused to direct a verdict for the defendant. But this could not properly have been done. It is true that the account was in the first place charged to Mrs. Root; this, however, is not conclusive. Considerable evidence was given on the trial tending to show that defendant treated the purchase as made on his account, and for his business. The goods were received at Root's Music House, with defendant's knowledge, and some of them placed upon the shelves, with other music, for

Digitized by Google

sale. Sales were made from them. About March 1, 1909, defendant received a statement of account from the plaintiff charging him personally for the Peter's Edition. Various payments were afterwards made by him on general account reducing the balance considerably below the price charged for that edition. Defendant and his wife separated about February 1, 1909, and the music in dispute remained in his store for a considerable time thereafter. And at some period after his wife left he told an attorney, who had the claim for collection, according to the attorney's testimony, that he had received these goods and he proposed to pay for them.

It is true that the defendant denies having made such statement to the attorney, and explains the payment on account by saying that he did not know what the balance of the account was, and that he did not intend to make any payment that should apply on the Peter's Edition. He also explains the failure to return the music, by saying that the matter was in negotiation between himself and the plaintiff. But these things were all for the consideration of the jury. It was within their province to reject these explanations, if they believed that, in consideration of all the testimony, they ought to do so. Even after the rejection of certain depositions, there was ample testimony from which the jury might find that Mrs. Root was defendant's general agent and practically managing the business; and the instructions given by the court relative to agency were not unwarranted.

If the liability for the Peter's Edition was a personal indebtedness of Mrs. Root's, it is true that any subsequent promise by Mr. Root to pay it was not binding because not in writing. But the court's instructions upon this feature of the case were all that the defendant could have required.

The court put it very broadly by telling the jury:

Digitized by Google

"If this bill of goods was not purchased by the authority of Mr. Root, nor accepted by him as his own goods, then he would not be bound by any promise to pay for them, either to Mr. Cavanaugh or anybody else, unless he had made his promise in writing, and unless there was a good consideration to support such promise."

It was not error for the court to decline to give the requests as framed by counsel for defendant when the matter was thus properly and thoroughly covered by the general charge. *Snyder* v. *Lumber Co.*, 135 Mich. 31 (97 N. W. 49). Nor were the remarks of the court as to the retention and examination of the music erroneous, inasmuch as such remarks could have been understood as applying only to the contingency that the music was purchased for and accepted by the defendant.

The court also fairly submitted the question of value to the jury. There was not a total failure of consideration, if the goods were purchased for and accepted by the defendant, inasmuch as he had received the thing purchased. The matter of value, in case the jury should find that it was not expressly fixed by the contract, was properly submitted; and recovery upon express contract could be had, under the common counts, if the price was fixed, and nothing remained but its payment. The other errors alleged have been carefully examined and do not require a reversal of the judgment.

There being no exceptions, we cannot consider the remarks made by plaintiff's counsel in his argument over the refusal of defendant to permit his wife to testify. Nor was it error for the court to refuse a new trial.

The judgment will be affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

HARNAU *v.* HAIGHT.

1. EVIDENCE—AUTOMOBILES—SPEED—SUFFICIENCY — INCOMPETENCY.
   In a personal injury case, for being run down by defendant's automobile, in the dark, testimony of an eyewitness, that from the exhaust of the car it appeared to be going 30 miles an hour, was immaterial and should have been struck out, since the speed of a car has no necessary relation to the rapidity of the exhaust if the clutch is out; but the witness having expressed his opinion that the rate of speed, independently of the exhaust, was about 20 miles an hour, the error in admitting the testimony was harmless.

2. SAME—OPINION EVIDENCE—SPEED.
   The opinion of a witness who had been an engineer, and whose qualifications were established to form such judgment, that an automobile which he only saw move over a space of 20 feet before it struck plaintiff was moving at the rate of 20 miles an hour, was properly admitted, and its weight was for the jury.

3. SAME—REBUTTAL—AFFIRMATIVE PROOF.
   While testimony that there were no lights on defendant's automobile was not properly rebuttal, the court did not err in the exercise of its discretion by receiving the evidence.

4. SAME—ORDINANCE.
   Where the plaintiff's contention was that he was riding along the street on a bicycle when defendant approached from the rear without lights and ran him down, and the contention of the defense was that plaintiff turned from the side and ran into the car, it was not error to exclude from the evidence an ordinance of the city wherein the accident occurred requiring vehicles that move slowly to keep as close as possible to the curb, on the right, allowing more swiftly moving vehicles free passage to their left; as the issues were such as to render the ordinance immaterial, the contributory negligence of plaintiff not being in issue if plaintiff's evidence was believed, and the fact

Digitized by Google

of being on the wrong portion of the road not affecting the claim of the defense that plaintiff without excuse turned into the moving automobile.[1]

5. TRIAL—CHARGE—REQUESTS.

Where counsel for defendant, in response to an inquiry of the court at the close of the charge, orally asked the court to instruct the jury in relation to defendant's contention and claim that plaintiff turned out of his course and ran into the side of defendant's automobile, and the court declined to instruct further, but the charge failed to cover the point referred to by defendant's attorney, the error was reversible and prejudicial although no request in writing was preferred; if such request was desired, counsel should have been given time in which to prepare it.

Error to Muskegon; Sullivan, J. Submitted October 13, 1915. (Docket No. 81.) Decided December 22, 1915.

Case by Peter Harnau against Louis P. Haight for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Cross, Vanderwerp, Foote & Ross, for appellant.

Turner & Turner, for appellee.

PERSON, J. This is an action to recover damages for personal injuries received by plaintiff on the evening of October 27, 1913. At the time of the accident he was riding a bicycle and going east on the south side of Western avenue, in the city of Muskegon. The defendant was also going east on the same side of the street with his automobile, and following the plaintiff. It was about 6 o'clock in the evening, and so dark that the street lamps had been lighted. The day had been cloudy, and some rain had fallen. The plaintiff claims

[1] On liability of automobile owner for collision with bicyclist, see note in 28 L. R. A. (N. S.) 557.

Digitized by Google

that the defendant was driving very rapidly, without any lights on his car, and that he overtook and ran over plaintiff before the latter could get out of the way. The defendant insists that the pilot lights or small lights on either side of the dashboard of his car were lighted, and that he was driving at a moderate or slow pace. It is his theory that as his car came alongside of plaintiff the latter turned his bicycle so as to avoid the street car tracks, thus colliding with the automobile and being caught under its left fender. The claims of the parties can be best stated in their own words. The plaintiff testified as follows:

"I live at 56 East Walton street, and am now 45 years old. My occupation is driving a team for the Muskegon Brewing Company bottling works. I was driving a team the day I was hurt. I was returning home on a bicycle at the time. I came straight up Western avenue, going east on the right-hand side. I had a light on the front end of my bicycle. It was shortly after 6 o'clock when I came along there by the Toledo, Saginaw & Muskegon depot. It had been an awful dark, dismal day that day. It had been raining in the afternoon and was cloudy. It was dark that night. It had been raining just a few drops that night, but it wasn't raining when the accident happened. I should judge it had been dark about half an hour—dark enough so street lamps had to be lit. I was coming along, and just as I got pretty near to the depot of the Toledo, Saginaw & Muskegon, I heard the whir of an engine of an automobile back of me. I turned around and saw a dark shape coming, and I yelled and tried to get out of the way, but it struck me before I could get away from it. I heard no warning or sound of a gong, or anything like that, except the whir of the engine just before it struck. I tried to get out of the way, and I couldn't. He was on to me too quick. He struck me from behind and turned me over. * * * When I turned around and saw that automobile coming there was no lights there. If there had been a light on that automobile, I would have seen it. There wasn't a particle of light on it. * * * When we

Digitized by Google

were going out to the hospital Mr. Haight made the remark a couple of times that he had his rain shield up and couldn't see a thing. He said he didn't see me until he struck me. I told him if he had his lights lit he couldn't help but see me, and he didn't make any reply to that. I think the automobile ran over me."

On cross-examination he further said:

"As I came down Western avenue from my work I kept close to the street car track. I should judge that the street car track was about 20 feet from the curb. After I passed the Pere Marquette track I didn't change my course any to speak of; I couldn't very well. It is pretty rough there where the street car track crosses the railroad track. At that time I was just going along at an easy gait on a bicycle. The pavement along there is pretty rough in places. You couldn't very well see the bumps only as you come to them. I kept on that side of the street car track. I might have varied a few feet either way in trying to escape bumps. It had been raining, and there were puddles all over the street. I might have turned a couple of feet either way to get out of the puddles, but I was on the right-hand side of the street car track all the way up. When the accident happened I had crossed the Pere Marquette tracks and had gone on towards the east from that track. The street car track on the east of the Pere Marquette track changes its course a little bit. There is a switch there that commences several feet from the Pere Marquette tracks, and as I was traveling along there I would come in towards the south a little on account of the switch. I don't think there was any time when I traveled between the rails of the street car track that night. When this accident happened, I was 3 or 4 feet from the rail of the street car track. It was quite dark. I couldn't see very far. There were street lights all the way up the avenue. There was a street light on the corner by the depot; that would be possibly a third of a block from where I was when the accident happened. The lights were only on the corners."

It was shown by the assistant city engineer that the

Digitized by Google

westerly end of the switch of the street railway track was about 12 feet east of the Pere Marquette crossing, and that it was 17 feet and 2 inches from the curb on the southerly side of west Western avenue to the first rail of the street railway track.

The defendant's testimony as to the accident was as follows:

"My place of business is situated about a quarter of a mile from the place of the accident. That evening as soon as the whistle blew at the mill I put on my things and went out to my machine. I pressed on the button which threw on the lights so that I could see how to put in my plug in order to start the machine. That switch lighted my pilots and tail light and the lights over my speedometer and clock. I backed out of the shed and came up past Ninth street. There I saw ahead of me on the left a light, and was looking for railroad trains, supposing that light to be the railroad guard there signaling for a train. There was a train due from Chicago that got in about 6 o'clock, and I thought probably that train was coming, so I threw out my clutch, and at the same time I noticed my speedometer, which was in plain sight. I was running at eight miles an hour. My brakes were not brand-new, and so I cut down my power on my throttle and coasted from just the other side of Ninth street up to the Pere Marquette crossing. Just before I reached that crossing I saw a green light almost ahead, but a little to the left of my right of way. It then disappeared and only the one light remained on the left-hand side of the road. Just about as I was crossing the Pere Marquette track I saw a red light. It seemed to be a little bit to the left of where the green light had been, then that disappeared, and the raindrops on my wind shield made the light from Eighth street appear as though there were many white lights there, but as I crossed I saw this light, and I heard the noise of the engine which was blowing off steam or pumping water. I started to put in my clutch, at which time I must have been running slower than when I threw out my clutch and started on up the street. Just at my left fender, back of it, appeared

Digitized by Google

suddenly a green light, and I saw a man go down under my fender. I didn't know what had happened, but I knew something had happened, so I turned my car and drew up to the curbing, threw out my clutch, and went back to see what was the matter. * * * The automobile is a Henry 40. I think it weighs 3,000 pounds. * * * The lights on my car were not out at any time that night. These pilot lights or small lights usually on the dashboard are on either side. * * * I can see half a block ahead with those lights for anything that is in the way of the line of vision. You can't see the sides. They are not intended to see on the outside. You cannot see on the side with the strong headlights. So far as operating the car is concerned, you can see as well with one as with the other. If Mr. Harnau had been directly in front of my car, I could have seen him. Just before the collision I heard Mr. Harnau call out something, but it was nothing that I could understand any more than, 'Look out there!' and was simply as he went down. I knew it was a man and a bicycle. The injury broke my left fender. * * * The front end of my fender was not touched a particle. If I had struck him, it would have struck the front end there, and broken that, instead of breaking it down here. * * * When I saw this man go down under the fender and I ran up to the curb and stopped, I did not apply my brakes. I simply turned my wheel to the right as far as it would go and then brought it up to the curb. I didn't use my emergency at all; just used my foot brake when I got up there."

On cross-examination he said:

"I had headlights on the car. Those lights are much brighter than the side lights and they throw a light far ahead of the car in the highway, much farther than the side lights do. I didn't have those headlights lit that night. The side lights are just ahead of the dashboard. It was a dark night. I had my wind shield up. I had to look through that wind shield. That was the only way that I could look ahead. I was seated on the right side of the car. When I started out from the factory it was raining. The top was up. All the side curtains on the machine were on. The rain

Digitized by Google

and the mist that had accumulated there on the wind shield did not perceptibly obstruct my view. * * * These side lights were electric lights. * * * I saw the tender of the locomotive after I got up there. The tender was towards me. It had no light on it, and I couldn't see the tender until I crossed the railroad. I was from 20 to 25 feet from the tender before I could see it. * * * I saw a green and a red light. I knew at that time the kind of light they carry on a bicycle. I knew they carried a green and red light. There was no tail light. I couldn't see anything except the side lights. As the green light came in range of my left pilot light I saw the man and the bicycle and the light all about the same instant, and saw him go down under my fender. My machine was past him before I saw him. I was going straight, right straight up; never changed my wheel at all to speak of. I could see him come into the fender. * * * I claim this man ran into me; that he was headed obliquely towards me and ran into me.

"*Q.* The back part of that bicycle then, the back wheel, appears to be crushed down, don't it?

"*A.* Yes."

It was charged in plaintiff's declaration that the defendant drove his automobile at a high, dangerous, and unlawful rate of speed, with a reckless disregard for the safety of others; that he did not keep a proper lookout for persons on the street, nor have his headlights lit, but recklessly disregarded his duty in these respects, and that he "approached this plaintiff from behind," and "did carelessly and negligently operate and drive said automobile directly upon this plaintiff."

The injury to plaintiff was severe and painful. There was a compound fracture of both bones of the right leg about halfway between the knee and ankle. The jury awarded him a verdict of $3,000, and the defendant brings the case to this court by writ of error.

1. The first six assignments of error relate to the admission of testimony. One Robert Pearson, a witness produced by the plaintiff, testified as follows:

Digitized by Google

"I have been an engineer since 1891 on the Pere Marquette road, and am still employed in that capacity. I know Mr. Harnau. On the evening of October 27th I saw him after the accident occurred lying mixed up with his bicycle on the pavement on Western avenue near the Pere Marquette tracks, about 20 or 30 feet east of it; that is, near the Toledo, Saginaw & Muskegon depot. It was on the south side of the street car track. I got a glimpse of the automobile that evening before he was struck by it. I noticed the speed at which the automobile was going. I am accustomed to taking speed of trains and other moving objects. I have some knowledge of those things. I have got to have.

"*Q.* Now, tell us, in your opinion, at what speed that automobile was going?

"*Mr. Foote:* Just a minute. I object to that. The witness hasn't shown himself competent to answer it.

"*The Court:* I will take his opinion anyway.

"*Mr. Foote:* Exception.

"*A.* Well, sir, the speed when he shot by the tank the way the machine was, his engine was running, it appeared to me that it was going about 30 miles an hour, but the automobile was going about 20. When I noticed this speed we were standing just north of the street car crossing, just to clear, so that a car could pass us. We were standing on the north side of the street. We were about 20 feet from the automobile and about 25 feet from where Mr. Harnau lay. I couldn't see him when he was struck. It was dark. * * * I couldn't see any lights on the automobile. There was nothing to obstruct my view from where I was."

On cross-examination he said:

"I was on the engine the night when this accident happened. * * * The first time I saw the automobile was when it shot from behind the tank. I did not see it as it approached the tank at all. But just as it shot by from behind the tank—right when it was directly opposite the tank on the engine—I saw it.

"*Q.* And it didn't go over 10 feet before Mr. Harnau came in contact with it—10 or 15 feet?

"*A.* Well, it was about 20.

Digitized by Google

"*Q.* Then, your estimate of the rate of speed that car was going was based upon what you saw it doing there at 20 feet; is that right?

"*A.* I based my theory on the rate of speed that automobile was going when it shot from behind the tank until I heard the explosion of the tire.

"*Q.* You didn't see any lights on this automobile?

"*A.* No, sir.

"*Q.* How far could you see from the cab that night?

"*A.* Well, I should judge that I could see about 30 feet."

On redirect examination:

"*Q.* You said something about determining something by the noise of the engine. What did you mean by that? What did you say about this engine.

"*A.* Why, from the exhaust of the engine I thought he was going about 30 miles an hour.

"*Mr. Cross:* I move to strike out what the witness thought, on the ground that he hasn't shown any competency to judge the rate of speed from the throb of a gasoline engine. * * *

"*The Court:* I am going to let it stand.

"*Mr. Cross:* Exception."

The testimony of Mr. Pearson about the speed of the engine as indicated by the exhaust was immaterial and incompetent. It is a well-known fact that the speed of the motor has no relation to the speed of the car if the clutch is out, and this was afterwards fully explained in the testimony of the defendant. But the principal reason why the speed shown by the exhaust of the engine was immaterial was because the witness himself did not use it to determine the speed of the car; in fact, he made it clear that the speed of the engine did not indicate the speed of the car, inasmuch as he testified that the car was going about 20 miles an hour, while the exhaust of the engine would indicate a speed of 30 miles an hour. But this testimony as to the speed indicated by the exhaust was undoubtedly made harmless by the witness' own explanation.

Digitized by Google

But the testimony of the witness as to what he believed to be the actual speed of the car presents a question of greater difficulty. There is no doubt about Mr. Pearson's competency to judge speed, but his opportunity to exercise such judgment in this case was very limited. He saw the automobile move through a space of only about 20 feet, "after it shot from behind the tank," to use his own words, and before the collision with plaintiff. He had no intimation that the automobile was approaching until it came into view from behind the tank, and the night was dark. In *Wright* v. *Crane,* 142 Mich. 508 (106 N. W. 71), the testimony of a witness was held incompetent who attempted to judge of the speed of an automobile from what he saw of it when passing over a space of 20 feet. But in that case the automobile was coming directly towards the witness, and the witness himself was not shown to have had any extraordinary knowledge of the speed of moving objects. In the instant case the witness was a railroad engineer of long experience. The court must take notice of the fact that it was part of his business to estimate speed by observation of objects which he was passing while in his engine, both by day and night. He must furthermore be given credit for some knowledge of his own ability in this respect, and he professed to be able to give an opinion in this case. We think the court was not in error in receiving his opinion as to the speed of the car. Such testimony should not be rejected unless it is clearly apparent that it can be of no value to the jury. Its weight is, of course, to be determined entirely by them. *Detroit, etc., R. Co.* v. *Van Steinburg,* 17 Mich. 99; *Guggenheim* v. *Railway Co.,* 66 Mich. 150 (33 N. W. 161); *Line* v. *Railway Co.,* 143 Mich. 163 (106 N. W. 719).

The witness Hazen Wilder was permitted to testify, on rebuttal, that he saw no lights on defendant's auto-

Digitized by Google

mobile. This testimony more properly belonged to plaintiff's main case, but the propriety of receiving it on rebuttal was discretionary with the court. *Kozlowski* v. *Railway*, 174 Mich. 412 (140 N. W. 459).

2. Error is assigned upon a ruling of the trial court excluding an ordinance of the city of Muskegon offered in evidence by counsel for the defendant. The particular provision of the ordinance which counsel wished to place before the jury reads as follows:

"Vehicles moving slowly shall keep as close as possible to the curb on the right, allowing more swiftly moving vehicles free passage to their left."

The ordinance was offered for the purpose of showing that the plaintiff, who was close to the street car tracks, and nearer to the center of the street than to the curb, was guilty of contributory negligence. The court excluded the ordinance as immaterial.

There are but two theories advanced as to the way in which the accident happened. If plaintiff's theory is true, the defendant, driving his automobile unlighted and at a high rate of speed, overtook the plaintiff and ran him down. If such was the case, the defendant was guilty of the most reckless conduct. Whether the plaintiff was guilty of contributory negligence or not in being near the center of the street, and in front of the car, such negligence could not have been a proximate cause of the accident. He was where the defendant, exercising any reasonable degree of care, should have seen him. The darkness of the night would have been no excuse whatever. If the plaintiff had come suddenly in front of the car, it would have been another thing, but that is not claimed by any one. According to his theory, he was riding along in the direction the car was taking and directly in its path. And the driver of an automobile cannot excuse himself for running down a man under such circumstances. He is required by law to have such lights as

Digitized by Google

will show objects immediately in front of him, and he must have his machine under such control as not to overtake and run down people within the scope of his lights.

"The contributory negligence of the plaintiff does not prevent recovery in a case where the defendant, who knows, or ought by the exercise of the most ordinary care to know, of the *precedent* negligence of the plaintiff, by his *subsequent* negligence does plaintiff an injury." *Richter* v. *Harper*, 95 Mich. 221, 225 (54 N. W. 768, 769).

The only other theory of the accident is that given by the defendant, who says that he did have lights upon his car sufficient to show him the ground in front of it for the distance of half a block; and he insists that the plaintiff was not riding in front of his car, but at one side, and turned as defendant came by and ran into defendant's car. If this version of the affair is true, then the defendant is not liable in this action. Plaintiff admits that he heard the automobile coming, and, if he turned and ran into it, he offered no excuse on the trial for doing so.

Hence in either case the ordinance was immaterial, and the court committed no error in excluding it. If defendant recklessly ran plaintiff down, as charged by plaintiff, contributory negligence was no defense. If plaintiff himself ran into defendant's car, he has advanced no theory by which he should be entitled to recover.

3. At the close of the trial, when the judge had finished his charge to the jury, he asked counsel:

"Is there anything I have overlooked?"

In reply counsel for the defendant said:

"If the court please, there is one claim of the defendant that I don't think you have specifically covered in your charge to the jury and upon which I ask your honor to charge them. It is claimed here by the

Digitized by Google

defendant that at the place where the accident happened was a street car curve, and that Mr. Harnau, either in getting out between the two street car tracks or in attempting to keep outside of the street car tracks where the turn is made, turned his bicycle towards the south, and therefore was not going in a line along the street, and that in so doing, as the automobile of the defendant was along the side of him, the plaintiff, Mr. Harnau, collided with the automobile by the bicycle being caught under the fenders of the car. I ask the court to charge the jury that, if it happened in that way, the defendant would not be liable for the accident; and, *secondly*, that they would have a right to consider that claim in considering this whole controversy."

In reply to this suggestion of counsel, the court said:

"I have charged you, gentlemen, all I am going to charge you. I charged you fully on the law of this case, gentlemen. You will take the case as I have given it to you."

Upon looking into the charge of the court, which is otherwise very full and complete, we cannot find that this theory of the defendant as to the cause of the accident was mentioned at all. As we have said, there were but two theories of the way in which it happened, the plaintiff's, and this of the defendant. The court had very fully stated the plaintiff's theory, and we think that, upon having his attention called to it, he should have explained to the jury the defendant's claim also. If, instead of being run down, the plaintiff himself ran into defendant's car, the latter would not be liable. In such event it was not claimed by any evidence at the trial that the accident resulted from the negligence of the defendant. It is true that the defendant's request was not in writing, but the court had asked counsel to mention anything omitted from his charge, and under the circumstances time should have been given counsel to present a written request

Digitized by Google

if that was desired. And the language in which the request was refused could not have been otherwise than detrimental to the defendant.

For this error, the judgment is reversed, and a new trial granted.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PEOPLE v. LUMLEY.

1. INTOXICATING LIQUORS—CRIMINAL LAW—MINORS — UNLAWFUL SALE.

Where respondent owned a building that was occupied by him in his business, being the headquarters of a fishing club, whose members kept liquor stored upon the premises and drank there, and beer was shipped to his place in cases with the owner's name attached, and where the practice in purchasing the liquor was to have the owner sign an order for the beer, and the respondent placed the order with the wholesaler, who held him responsible for the price, and in supplying club members with the liquor it was obtained by means of a service card on which a record of the liquor supplied was kept by a series of punches, respondent controlling and delivering the beer as wanted, he was guilty of furnishing liquor to a female minor who came to the club quarters with a member and two companions, to whom respondent brought in four bottles of beer and glasses for each person, and where all four were present in the parlor, when he brought in the beer, and it was charged or punched on the service card of the member; under the statute (Act No. 160, Pub. Acts 1909) the fact that the club member owned the beer was no excuse.

Digitized by Google

2. SAME—JOINT OFFENSE.

That the club member was also guilty did not relieve the respondent from responsibility: there may be a joint furnishing of the liquor.

3. SAME.

Under section 2, Act No. 160, Pub. Acts 1909, intent is not made an ingredient of the offense and ignorance of the fact that the female was a minor did not constitute a defense. It was his duty to see to it that there were no minors in the party before furnishing them with liquor.

Exceptions before sentence from Jackson; Parkinson, J. Submitted October 28, 1915. (Docket No. 105.) Decided December 22, 1915.

George H. Lumley was convicted of furnishing intoxicating liquor to a minor. Exceptions overruled.

Nathan E. Bailey, Prosecuting Attorney, and *M. Grove Hatch*, Assistant Prosecuting Attorney, for the people.

John F. Henigan, for respondent.

PERSON, J. Respondent was convicted, under Act No. 160, Pub. Acts 1909, of furnishing beer to one Grace Bassett, as a beverage. The second section of the act reads as follows:

"SEC. 2. It shall not be lawful for any person to sell, furnish, or give to any minor as a beverage any brewed, malt, fermented, spirituous, vinous or intoxicating liquor or any mixture containing any of said liquors."

Upon the trial the respondent testified that a building which he owned, and in which he did business, in the village of Michigan Center, in Jackson county, was the headquarters of a certain club known as the Lakeview Fishing Club. It was, he said, the practice of such members of the club as wished to do so to keep

Digitized by Google

liquor stored upon the premises and to drink it there. The beer came to his place in cases with the owner's name attached, and each case held 24 pints of beer. The price of such a case of beer to the wholesaler was $1. Sometimes, and perhaps usually, the member signed an order for the beer, and respondent placed the order with the wholesaler, and was held responsible by the latter for the price of the case. The beer so ordered was kept by the respondent in a room used for that purpose. Whenever a member wished any of the beer in the case with his name attached to it, he would purchase of respondent what was called a stock or service card, upon which were 24 places to be punched. For this card he would pay respondent $1. If the member had himself paid the wholesaler for the beer, respondent would punch 1 place for each pint ordered, the respondent keeping the money paid for the card as a remuneration for his services. If the member had not made payment to the wholesaler, respondent would punch 2 places for each pint of beer, to the effect that the card would be used up when the member had received 12 pints (in one place he says 10 pints), and he would have to purchase another card to get the remainder. In this way respondent would get enough money for each case to pay the wholesaler, and to make compensation to himself for his services. Respondent said that the beer remained under his control, and that if a member—

"wanted to get beer in the regular way by the use of the card, he would have to get it from me or my assistant."

In this behalf he also further testified:

"I had the beer there under my control, but he [the member] couldn't have got any beer until he laid down a dollar to me, or, rather until he got a stock or service card and paid for the beer as he got it. He would have to pay me for it."

Digitized by Google

Respondent also testified that on the day in question a member of the club by the name of Ozier came to his place, with a party consisting of three other persons. It is conceded that the persons constituting the party were a Mr. Maloney, Grace Bassett, and her sister, all under the age of 21 years. Ozier and this party went into the room called the parlor, and it is respondent's testimony:

"He [Ozier] came into the kitchen, the adjoining room, and called to me, and said he had a party there and he wanted to get four bottles of his beer. He purchased a stock card. I punched out for the four bottles. Mr. Ozier then left and went into the adjoining room, and later on I took in the four bottles on a tray and left them on the table."

Respondent punched 8 places in the card because Ozier had not paid the wholesaler. Respondent further testified:

"I took glasses with the beer, four of them. The bottles were opened and had a tin stopper with a cork. * * * I put the four glasses and four bottles on the table."

He further says:

"I didn't take particular attention where the girls were or who they were. They might have been sitting around the table, or they might not. I didn't take any particular attention. * * * I just walked in—just as long as placing the tray on the table and walking out. I didn't have any conversation with the parties in there at all. I did not know Maloney, nor either one of the Bassett girls. I had never seen either one of the girls before that I know of."

He further says that Maloney came out into an adjoining room and ordered some sandwiches, and that respondent took the sandwiches into the parlor some 10 minutes after he had taken in the beer, and that then each one of the party had a glass and was drink-

Digitized by Google

ing. The fact that the girls were in the parlor when respondent took the beer in is not questioned. And it is conceded on the record that Grace Bassett was at the time a minor.

The circuit judge, in his charge to the jury, after reviewing the facts, said to them:

"Assuming this was a club and in that respect legal for the purposes of this case, yet it being designed for the purpose that it was actually accomplishing, a storehouse for the liquor or goods of members, the proprietor should see to it, in my judgment, that parties who cannot lawfully be furnished with intoxicants should not be permitted to be so furnished on his premises."

And he closed his instructions as follows:

"So, gentlemen, I say to you that on the undisputed evidence in this case, that which the defendant concedes and what he has stated on the stand, in my judgment, under the law you ought to find the defendant guilty as charged in the information in this case. I cannot say to you that you must do it, or that you should render a verdict without leaving your seats, because the jury is the judge of the evidence. I see no way, however, how you can avoid complying with the opinion I have expressed as to the law, unless you are able to say you cannot believe Mr. Lumley's concessions and admissions as to what he did, and how you can do that I don't know. Maybe you can. So you may retire and consider of your verdict which, in my judgment, should be a verdict of guilty."

Thereupon, after retiring to their room and considering the matter, the jury rendered a verdict in accordance with the opinion of the circuit judge.

In his brief filed with this court, counsel for respondent says:

"The single point in the case is whether or not, under this statute, Lumley, who delivered the beer in the room where Ozier and the others were, violated this section 2 of Act No. 160 by failing to see to it 'that parties who cannot lawfully be furnished with intoxi-

Digitized by Google

cants should not be permitted to be so furnished on his premises."

And counsel's contentions in the argument are very well summed up in his propositions:

"That if the jury found that all Lumley did was to deliver Ozier's own beer to Ozier, Lumley would not be guilty," and "that in order to make Lumley guilty he must have done something or had some knowledge or understanding that Ozier intended to deliver the beer to the minor to be drunk as a beverage."

We think that the respondent was unquestionably guilty of the offense charged, under his own admissions. Including Ozier, there were four persons in the party to be supplied with liquor, and respondent intended to supply each one of the four, because he took in not only four bottles but also four glasses. Whether he knew Grace Bassett or not, he produced the liquor, expecting that she would take part in drinking it, inasmuch as he supplied her with a glass for that purpose. He intended to supply liquor to the identical person charged in that behalf in the information, and that person is conceded to have been a minor.

It was not material whether Ozier was the technical owner of the beer or not, and we do not pass upon that question. The respondent says that his own possession of it was such that Ozier could get it, in the regular way, only through himself or his assistant, and could not get it at all except by purchasing from him a stock or service card. The liquor was as much furnished to the minor by the respondent in this case as it would have been by a saloon keeper had the latter set it before her at the request of some third party who paid for it. And that a saloon keeper would be guilty of "furnishing," under such circumstances, has been fully determined by this court. *People* v. *Neumann*, 85 Mich. 98 (48 N. W. 290). That Ozier was also

Digitized by Google

guilty did not exonerate respondent; there could well be a joint furnishing of the liquor.

Inasmuch as the respondent intended to furnish liquor to the entire party, which included Grace Bassett, it was not an essential part of the offense that he should have known at the time that she was a minor. He does not claim to have been a dealer under the general law regulating the liquor traffic, nor that his house was a place where intoxicating liquors were sold or kept for sale. His offense comes, therefore, within the second section of Act No. 160, Pub. Acts 1909, and intent is not made an ingredient of the offense under that section. *People* v. *Averill*, 179 Mich. 224 (146 N. W. 189). And while the court's instruction that "the proprietor should see to it, in my judgment, that parties who cannot lawfully be furnished with intoxicants should not be permitted to be so furnished on his premises" may have been too broad for universal application, yet it was respondent's duty, under the circumstances of this case, to assure himself that there were no minors among the party before furnishing them with liquor.

The exceptions are overruled, and a court below is advised to proceed to judgment.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

DUGAS *v.* MUNISING, M. & S. E. RAILWAY CO.

1. RAILROADS—NEGLIGENCE — CROSSINGS — CATTLE GUARDS — CONTRIBUTORY NEGLIGENCE.

Where plaintiff, returning home from a village in Marquette county on a dark and stormy night in winter, because of a heavy fall of snow, was not able to guide the horses, but permitted his team to have their heads and follow the road by instinct, and, at a point in the highway at which defendant railroad crossed it diagonally, the team diverged from the road, following the track for some distance, when they encountered and were struck by a train, he was guilty of contributory negligence, barring a recovery for the personal injuries which he sustained; defendant's negligence in failing to have statutory safeguards and fence at the crossing was not a sufficient reason for permitting plaintiff to recover.

2. SAME—DUTY TO LOOK AND LISTEN.

One should exercise as much caution about remaining upon a railroad track as in going on it, and upon plaintiff's testimony that he looked for a train on arriving at the crossing but did not thereafter ascertain whether or not he had crossed, the trial court was right in directing a verdict for defendant.

Error to Marquette; Flannigan, J. Submitted October 21, 1915. (Docket No. 39.) Decided December 22, 1915.

Case by Peter Dugas against the Munising, Marquette & Southeastern Railway company for personal injuries and damages to team and sleigh. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Joseph H. Primeau, Jr., and *Le Gendre & Driscoll*, for appellant.

William P. Belden and *Thomas Clancey*, for appellee.

Digitized by Google

PERSON, J. The plaintiff brings this action to recover damages which he claims were caused by certain acts of negligence on the part of the defendant railway company, and without any contributing negligence upon his part. The case was disposed of in the court below upon the latter part of the proposition, and consideration of the matter in this court will be confined to that phase of the case.

The plaintiff, on the 13th day of January, 1912, was returning from a village in Marquette county, called New Swanzy, to his home about eight miles distant. The road which he was traveling ran easterly from the village, on the northerly side of the railroad track for about half a mile, when it turned and crossed the track at something less than a right angle, then continued its course easterly on the south side of the railroad and in very close proximity to it. In some places the highway was not more than 6 or 8 feet from the track and in other places it got away from it as much as 25 feet. There were from 6 inches to 18 inches of snow upon the ground—the witnesses differing as to this—and the plaintiff was driving a span of horses hitched to a sleigh.

It was about 8 o'clock in the evening when he left New Swanzy, the night was dark and cold, and the snow was blowing and drifting to a considerable extent. Plaintiff sat upon the bottom of his sleigh, well wrapped up to protect him from the cold, and holding the lines in his hands. He says that he knew when he reached the railroad crossing and looked to see if any train was approaching. He was, however, letting his horses have pretty much their own way in following the road, thinking, as he says, it was safer, in the dark, to trust to their intelligence than to attempt to guide them. The railroad right of way was entirely unfenced and without cattle guards or wing fences approaching the guards, and this was well known to

Digitized by Google

plaintiff. The failure to construct fences and cattle guards is the principal negligence charged against the defendant. When plaintiff's horses reached the railroad track they did not, as he says he supposed they would, follow the highway across the track, but, on the contrary, turned directly upon the railroad track, and continued in an easterly direction between the rails. Plaintiff, sitting on the bottom of the sleigh, did not observe the course his horses were taking, but supposed all of the time that they were still following the highway, which, as has been stated, ran very closely along the south side of the railroad track. When he had proceeded about a mile between the rails, he noticed the headlight of a train approaching him from the east, but, still thinking that he was in the highway, he continued to watch the approaching headlight, and had got about 50 feet into a cut, which was some 4 feet deep, when the engine struck the horses, killing them both, and throwing the plaintiff upon the ground outside of the track, with a broken leg and other injuries.

The circuit judge instructed the jury that the plaintiff could not recover damages for any injury that he had received to his person; but, by consent of counsel for the railroad company, he was allowed damages for the loss of his horses and the injury to his sleigh and harness. Damages for injury to his property is not in question here, and the controversy turns upon the correctness of the court's instruction that the plaintiff cannot recover for the injuries to his person, because of his own contributory negligence. This is not an instance where the absence of railroad fences and cattle guards misled the plaintiff as to the location of the railroad tracks. He knew when he was approaching the crossing, and looked, he says, to see if a train was coming from either way. It was as much his duty to have assured himself that he was over the

Digitized by Google

crossing, as it was to assure himself that he might safely go upon it. One should exercise as much caution about remaining upon a railroad track as in going upon it. In this case, however, the plaintiff took no care to see that he had gotten off the track, but left that matter entirely to the knowledge or instinct of his horses, which he was not justified in doing.

The other charges of negligence, averred in the declaration, and mentioned by counsel in their brief, do not seem to be supported by evidence.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

SHUMWAY *v.* MASON.

ESCROWS—DELIVERY—EVIDENCE—DEEDS—INTENT.

Though a deed may be delivered so as to become a valid conveyance by depositing it in escrow with a third party, evidence not showing a completed delivery by the decedent grantor, to the third person, with the intent to leave it for the benefit of the grantee, merely having a tendency to show that it was among the papers of the third person, a brother of the grantor and grantee, *held*, insufficient to establish a valid conveyance.

Appeal from Lenawee; Chandler, J. Submitted October 27, 1915. (Docket No. 68.) Decided December 22, 1915.

Bill by Francis R. Shumway and others against Al-

Digitized by Google

mira Mason and others for partition. From a decree for complainants, defendants appeal. Modified and affirmed.

Herbert R. Clark and *Henry I. Bourns*, for complainants.

J. N. Sampson, Burton L. Hart, Earl C. Michener, and *Leland F. Bean*, for defendants.

BROOKE, C. J. The bill of complaint in this cause is filed for the partition of certain lands in the township of Madison, formerly the property of one Levi Shumway, who died August 3, 1834. The lands having been partitioned into narrow strips of about 17 acres each among his children, two of them, Abigail Shumway and Clarissa Shumway Cole, purchased the shares of the other heirs, and thereafter lived together upon the farm until the death of Abigail Shumway in 1907. Clarissa Shumway Cole, after the death of Abigail, continued to live upon the premises until she died in April, 1911. After the death of Clarissa, the administrators of the estates of the two sisters divided the income from the premises equally, the same as the sisters had done in their lifetime. Upon the trial complainant offered in evidence a quitclaim deed from Clarissa Cole to Abigail Shumway, dated November 29, 1892, and recorded May 28, 1912, more than a year after the death of Clarissa. It is conceded by all parties to the litigation that the land in question cannot be partitioned, but that it should be sold and the proceeds divided among complainants and defendants as their several interests may appear. The only question involved in the case hinges upon the delivery of the deed from Clarissa to Abigail. If said deed was properly executed and delivered, and is to be considered as a valid instrument conveying title, then the complainants in the case take a larger proportionate share of the com-

Digitized by Google

mon property than they will take if it be held that the said deed never became operative. The facts in the case illuminative of the question involved seem to be the following:

These two old ladies apparently entertaining a strong affection for each other, lived together upon the farm in question for a great many years. While one of them owned a greater area of land in the farm than the other, buildings upon that portion owned by the latter seem to have made their several holdings about equal in value. It is clear from the record that so long as both of them lived they divided equally the proceeds derived from the farm. An impression prevailed among their friends and relatives, gathered from frequent conversations with one or the other of the sisters, that it was the intention of both that the survivor of them should take what belonged to the one who died first. No direct and clear evidence is contained in the record as to how this arrangement was to be carried out, or whether in fact papers had been drawn to effect it. In 1907 Abigail died. She left a last will, by the terms of which she bequeathed her personal property to Clarissa, and she likewise gave to Clarissa a life interest in her real estate. Clarissa at that time handed to the judge of probate Abigail's will and likewise a quitclaim deed from Abigail to her, which upon examination by the judge of probate was found to convey to Clarissa a life estate only in the real estate owned by Abigail. The judge of probate advised Clarissa to pay no attention to the deed as she took under the will as large an estate as under the deed. There is evidence in the record to the effect that upon being advised by the probate judge of the character of the estate conveyed to her, in the deed from Abigail to her, Clarissa said, "I gave Abbie a good deed." After Abigail's death, Clarissa continued to occupy the farm,

Digitized by Google

receiving the entire income therefrom up to the date of her own death in 1911, and thereafter the administrators of the several estates of the two sisters continued to divide the income from said farm equally between the two estates. The fact that the deed in question existed appears to have been unknown to any person living for more than a year after the death of Clarissa. It was then discovered by complainant Francis R. Shumway, who was a nephew of Clarissa and Abigail. It was found among the papers of Nathan Shumway, a brother of the two old ladies. The evidence indicates that Nathan Shumway sometimes drew instruments of a legal character, and that while he lived he advised with and drew papers for both Clarissa and Abigail. His relations with one appear to have been as close as with the other. The deed was drawn by him and was witnessed by him. It was dated in 1892, and was kept by him until his death in 1899, and continued to lie in his safe until 1912. There is nothing in the record to indicate that Nathan Shumway held the deed as agent for his sister Abigail rather than as agent for his sister Clarissa, nor is there anything to show that at the time it was left in his possession it was delivered to him by Clarissa with the then present intention on her part to relinquish control over the same. The learned circuit judge who heard the case determined that the evidence supported a finding that the deed was delivered. Counsel for complainant assert that this finding is justified for two reasons:

(1) Because it is recited in the deed that it was signed, sealed, and delivered in the presence of two witnesses. This, counsel urge, is some evidence of delivery, citing *Dennis* v. *Dennis*, 119 Mich. 380 (78 N. W. 333).

(2) They point to the remark made by Clarissa in the probate court, upon being advised of the character of Abigail's deed to her, to the effect that, "I gave Abbie a good deed."

Digitized by Google

From this statement they argue that Clarissa then intended to convey the idea that she had executed and delivered a deed of her interest in the farm to her sister Abigail and that she had relinquished all control over the same.

There is no doubt about the rule urged on behalf of complainant that a delivery of a deed to a third person for the benefit of the grantee, in the absence of anything conveying a different intention, is as much a delivery as if made to the grantee himself. *Hosley* v. *Holmes*, 27 Mich. 416; *Cooper* v. *Cooper*, 162 Mich. 304 (127 N. W. 266). The assertion of this principle, however, does not aid complainant, because there is absolute lack of evidence tending to show that Clarissa delivered the deed to Nathan Shumway for the benefit of Abigail, the grantee therein named. We are unable to attach to the statement alleged to have been made by Clarissa in the probate court the weight and importance which it possesses in the opinion of counsel for complainant. The statement may have been made by Clarissa to indicate simply that the deed in question had been made and executed, but it does not necessarily carry the meaning that it had been delivered. In the case of *Devaney* v. *Koyne*, 54 Mich. 116 (19 N. W. 772), it was said:

"There is testimony which seems credible, that defendant frequently spoke of having conveyed to Mary; but it is quite possible that in doing so she merely referred to the execution of this deed, which was no secret. * * * The complainant has the burden of proof, and we are not satisfied it preponderates for her. While there is strong testimony in her behalf, there is also very strong testimony that defendant, at any rate, never supposed she had put the property beyond her control."

In the case at bar we think it may well be said that the circumstances strongly indicate that Clarissa never

Digitized by Google

understood to the day of her death that she had parted with the legal title to her interest in the farm. She lived on the farm for 15 years after the execution of the deed, with her sister, with whom she divided equally the income thereof, and after her sister's death she possessed it all; that part which had belonged to her sister being held by her under the life estate created by the last will of her sister. It is significant that, at the time an inventory of the estate of Abigail was prepared by those responsible for the same, they, after a conversation with Clarissa, did not include Clarissa's portion of the farm in the inventory of Abigail's estate. It may be said that they did not do so because of their ignorance of the existence of the deed from Clarissa to Abigail, and this would be persuasive if it were not for the fact that Clarissa, from whom they obtained their information, certainly knew of the deed and knew whether or not she had delivered it to Nathan Shumway with the purpose of relinquishing all control over it.

After a careful consideration of all the testimony in this record, and assuming that the deed in question was genuine and properly executed (of which we have no doubt), we are unable to say that there is such evidence of delivery as to warrant a judicial finding to that effect, in view of the situation of the parties and all the circumstances disclosed by the testimony.

The decree of the court below ordering a sale and partition of the property is affirmed. That portion of the decree fixing the proportionate shares to which the parties are entitled is reversed, and a decree will be entered in this court fixing said proportions as if the deed in question had never been made, with costs of both courts to appellants.

PERSON, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred. BIRD, J., did not sit.

Digitized by Google

MINDS *v.* KEYES.

1. BROKERS—EVIDENCE—COMMISSIONS.
   In a broker's action for commissions on the sale of real property, disputed claims of plaintiff as to an agreement between him and defendant, another broker, to divide commissions, *held*, to present a question of fact for the jury.

2. APPEAL AND ERROR—TRIAL—REQUESTS.
   The Supreme Court will not, in civil causes, consider assignments of error based upon the failure of the court to give instructions for which no requests were filed.

3. SAME—NEW TRIAL—DISCRETION—EXTENT REVIEWABLE.
   The action of the trial court in declining to grant a motion for a new trial, indicating no abuse of discretion, will not be reviewed by this court on writ of error.

Error to Wayne; Mandell, J. Submitted October 18, 1915. (Docket No. 140.) Decided December 22, 1915.

Assumpsit by Hugh L. Minds against George H. Keyes on a contract to divide broker's fees. Judgment for plaintiff. Defendant brings error. Affirmed.

Harry M. Lau (*Frank H. Watson*, of counsel), for appellant.

Prentis & Mulford, for appellee.

BROOKE, C. J. This suit was instituted by plaintiff against defendant for the purpose of recovering from defendant one-half of a real estate commission received by defendant from one Mrs. Hovey, upon the sale of 95 Washington avenue, Detroit, for the sum of $52,000. The sale appears to have been made on May 27, 1911. The property had been listed for several years by Mrs. Hovey with defendant, and in the fall of 1909

Digitized by Google

plaintiff claims to have entered into an agreement with defendant by the terms of which he (plaintiff) was to assist in the sale of said Washington avenue property, and if a sale were made he was to receive one-half the commission paid by Mrs. Hovey. It is the claim of plaintiff that some time thereafter he introduced one Stuart to defendant, Stuart then being the owner of a large flat building valued by him at the sum of $55,000, and an effort was made by plaintiff and defendant to accomplish a trade between Stuart and Mrs. Hovey of their several properties, under an agreement that their commissions should be pooled and equally divided. After some negotiations relative to this sale, it was dropped; Mrs. Hovey declining to entertain the proposition. About 1½ years later Mr. Stuart entered into a contract of purchase with Mrs. Hovey for the Washington avenue property. It was plaintiff's claim that subsequent to the failure of the trade he constantly urged Stuart, who was a frequent visitor at his office, to buy the Washington avenue property. This does not appear to have been denied by Stuart, who was a witness upon the trial, although he testifies that he was induced to renew negotiations with Mrs. Hovey by reason of the changed conditions in the neighborhood of the property, involving the erection of a hotel or convention hall, which he believed would require the occupation of the whole block.

Defendant denied the making of the contract for a division of the commission on the sale of the Washington avenue property, and asserted that the only arrangement made between plaintiff and himself was that growing out of the attempt to effect a trade of the flat building belonging to Mr. Stuart for the Washington avenue property belonging to Mrs. Hovey.

The learned circuit judge who tried the case charged the jury, in part, as follows:

Digitized by Google

"This is an action upon a contract. It does not make any difference what the equities are or the justice of the situation might be, because this action is brought upon what the plaintiff says was an expressed contract, which was oral in its nature, and the plaintiff claims that he performed his part of the contract and has not received his money. His claim in regard to the contract is this: That on a certain occasion in 1909, he and the defendant met. The defendant said: 'I have charge of certain property on Washington Boulevard, and I want you to help me sell it, and if you will help me sell this property I will divide my commission with you.' * * * The defendant says no such contract was ever entered into, and you, gentlemen of the jury, as judges of the facts, will have to determine whether that kind of a contract was ever actually made between the parties, the plaintiff and the defendant. Let us examine the situation and see what it was, because we are often aided in determining issues by seeing what the exact situation is and the relationship of the parties to the situation and all those things are.

"Now, the plaintiff at the time of the negotiations knew a man by the name of Stuart and had certain property belonging to Mr. Stuart in his hands for sale or trade. At the time in 1909 that it is claimed this contract was made, the defendant had charge of certain property belonging to Mrs. Hovey, and it is claimed by the plaintiff that they met, and that the negotiations that led up to this contract all had reference to the sale of the property by the defendant with the aid and active assistance of the plaintiff. Now, we have been told that there were certain propositions with regard to the trade of certain improved property, a flat or an apartment house, for this property. We are told that that deal fell through; we are told numerous interviews were had with the man who purchased the property subsequently with the plaintiff and the defendant, and that these negotiations either totally or in part came to an end. The plaintiff claims that he continued his efforts by offering inducements and active aid and assistance in the sale of this property of Mrs. Hovey's by the defendant. The claim of the defendant, on the other hand, is this:

Digitized by Google

That they tried to effect a deal, but the only deal they tried to bring about was a trade of the properties of Mrs. Hovey and Mr. Stuart; that these negotiations came to an end in 1909; and that the man who subsequently purchased the property, Mr. Stuart, forgot all about this property; and that the defendant had no further negotiations concerning the sale to Mr. Stuart; and that all those negotiations were at an end; and that a year and a half afterwards Mr. Stuart began negotiations with Mrs. Hovey for the purchase of this property only because of the changed conditions; and that he (Mr. Stuart) was referred to the defendant by Mrs. Hovey, who owned the property.

"Negotiations were carried on wholly and alone by him, unassisted by the plaintiff, and these negotiations culminated some time afterwards in the sale of the property. The defendant says he had no negotiations with the plaintiff whatsoever, except concerning the trade of the property, and he says he never told him that if he would help him or aid him in any way, materially or otherwise, in the sale of the property, that he would divide the commission. * * *

"Should you, after an examination of all the evidence, determine that there was a contract such as the plaintiff claims under, that he was to receive half of defendant's commission in case this property was sold, then you will have to study the evidence to determine whether or not the plaintiff did actually help, was either procuring or effective cause of what subsequently transpired. With regard to that, they dispute one another, and you should consider all of the evidence in the case. Mr. Stuart has told his story. He has told you what brought about his purchase of the property, what induced him to buy it, and you should take that into consideration in determining whether or not the plaintiff actually earned the commission. Now, as I said, it is unfortunate that these people do contradict one another. It is unfortunate that contracts are not all in writing, so that there can be no quibbling or misunderstanding about them; but people do not ordinarily have opportunity to put their contracts in writing, and they did not in this case see fit to do it, and you will have to find out from a study of the evidence what the truth of the controversy is with regard to

Digitized by Google

the contract itself, and, if the contract did exist, whether or not the money was earned. There can be no separation or division. There is no question of the fact that the defendant did obtain a thousand dollars commission; so, in case the plaintiff is entitled to recover, he is entitled to recover one-half of that with interest due from the date of the last payment, and you will have to study the evidence to determine when it was. The burden of proof is upon the plaintiff. He must establish his case by a fair preponderance of the evidence. If he has failed to prove his case on both of these points that I have mentioned, he cannot recover. If in regard to both of them he has convinced you by a fair preponderance of the evidence, he should recover."

During the trial of the case the record fails to disclose any exception taken on behalf of defendant until the testimony was closed. Thereupon counsel for defendant moved for a directed verdict on four several grounds. The motion was overruled and an exception duly taken. No requests to charge were preferred on behalf of the defendant, and no exception was taken by defendant to the charge as given. Plaintiff having recovered a verdict, a motion for a new trial was made by defendant and denied by the court.

Defendant's assignments of error follow:

"*First.* The court erred in denying the defendant's motion to direct a verdict for said defendant, made at the close of the plaintiff's testimony, on the grounds:

"(*A*) The failure of the plaintiff to show that he was the procuring cause of the alleged sale of May 27, 1911.

"(*B*) Because upon the undisputed testimony produced on the trial of said cause, it shows that the proposition as originally suggested, between Stuart and Mrs. Hovey, was for the exchange of properties, which negotiations failed, and the purchase, sale, and exchange of the Hovey property was abandoned in November, 1909.

"(*C*) Because after the proposition for exchange of properties failed in November, 1909, and was aban-

Digitized by Google

doned, Mr. Stuart, under the law, was not a customer of Mr. Minds so as to prevent Mr. Stuart and Mrs. Hovey at a subsequent date effecting a sale or purchase of the Hovey property; they both acting in good faith.

"(*D*) Because the testimony shows that Mr. Minds had nothing to do with the sale of May 27, 1911.

"(*E*) Because the plaintiff failed to show that his efforts and services were the effective, predominating, efficient means of bringing about the sale of May 27, 1911.

"(*F*) Because the court erred in not challenging the attention of the jury to the diversity of the alleged contracts claimed by the plaintiff to have been made by him with the defendant.

"(*G*) Because the court erred in not calling the jury's attention to the fact of the abandonment of the contract for the exchange of properties.

"(*H*) Because the court erred in not charging the jury that plaintiff was not entitled to recover, because the alleged contract under which he claimed to be entitled to commission was not based upon a legal consideration.

"(*I*) Because the court erred in denying the defendant's motion for a new trial."

With reference to the first assignment, to the effect that the court erred in denying defendant's motion for a directed verdict, a sufficient answer, we think, is contained in the brief of counsel for appellant, where he says:

"The testimony as to the terms of the contract being conflicting, raised a question of fact for the jury under proper instructions from the court."

With reference to all the assignments numbered A, B, C, D, and E, it may be said that the testimony of the plaintiff was in conflict with that offered on behalf of the defendant, and clearly raised a question of fact for the determination of the jury under appropriate instructions.

Touching assignments F, G, and H, we must hold

Digitized by Google

that, no requests having been preferred, the court will not in civil cases consider assignments of error predicated upon the failure of the court to give instructions not asked for. *Alderton* v. *Williams*, 139 Mich. 296 (102 N. W. 753). Aside from that, we are of opinion that the charge as given fairly presented to the jury the conflicting theories of the parties and the issues involved.

Assignment of error I, based upon the denial of the motion for a new trial, is without merit. The action of the court, in our opinion, indicates no abuse of discretion, in the absence of which this court will not interfere. *Cooper* v. *Carr*, 161 Mich. 405, 412 (126 N. W. 468).

The judgment is affirmed.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

MILLAR *v.* HILTON.

1. CONTRACTS—LEX FORI—CONFLICT OF LAWS—REMEDY.
   The validity and construction of a contract are controlled and to be determined by the laws of the *situs* or place where the contract was entered into, while the remedy for enforcing a foreign contract is regulated by the laws of the forum or country where such remedy is pursued.[1]

2. LIMITATION OF ACTIONS—FOREIGN CONTRACTS—BILLS AND NOTES—PRIVATE INTERNATIONAL LAW.
   The Michigan statute of limitations contains no special provisions recognizing the bar of limitations under a foreign statute, as is the case in some States, where,

[1]As to conflict of laws regarding questions arising under bills and notes, see notes in 61 L. R. A. 193, 19 L. R. A. (N. S.) 666.

Digitized by Google

however, it must appear that the period fixed by the foreign statute had fully run and the bar was complete before the defendant came within the jurisdiction of the State.

3. SAME.

Defendants owed plaintiff on a promissory note executed in Canada, where the parties resided, and defendants moved to Michigan, when the note had been due 6 years and a half. In neither place had the statute of limitations run so as to bar an action, at the time plaintiff brought suit in Michigan. *Held*, that the law would not be enforced as a matter of comity in a foreign country and that the two statutes could not be tacked together to bar the right of action.

4. SAME—BAR.

In an action begun in one State or jurisdiction upon a contract made in another, a plea of the statute of limitations existing in the place of the contract is not good as a bar to the action, but a plea of the statute existing in the country or State where the suit is in litigation is sufficient and as a universal rule, the statute operates merely upon the remedy; the law of the forum, not the law of the *situs* of the contract, controls.

5. BILLS AND NOTES—FOREIGN CONTRACT—PRIVATE INTERNATIONAL LAW—FORUM.

A promissory note negotiated, dated, signed, indorsed and delivered in Ontario, where it was also made payable and where all the parties resided, was a foreign contract, and though the right of action was transitory, the contractual rights of the parties were governed by the law of the place of contract.

6. SAME—HUSBAND AND WIFE—INDORSEMENT BY WIFE.

Under the law of the place of execution the payor's wife was liable on her indorsement with the same force and effect as though she was unmarried and proof of her signature, in the absence of evidence of duress or undue influence, made out a *prima facie* case. No presumption arose from the fact of coverture that shifted the burden of proof to plaintiff.[1]

[1]On the enforcement of a personal contract of a married woman capable of contracting according to the law of another state or country where the contract was made, see note in 26 L. R. A. (N. S.) 774.

Digitized by Google

Error to Wayne; Mandell, J. Submitted October 18, 1915. (Docket No. 13.) Decided December 22, 1915.

Assumpsit by Charles Millar against Francis A. Hilton and I. G. Hilton upon a promissory note. Judgment for plaintiff against Francis A. Hilton and for defendant I. G. Hilton on a verdict directed by the court. Plaintiff and defendant F. A. Hilton bring error. Affirmed as to defendant, appellant. Reversed as to defendant I. G. Hilton.

Moore & Moore, for plaintiff.

Lodge & Brown, for defendant.

STEERE, J. This appeal involves a judgment, in an action begun in the Wayne county circuit court, May 9, 1912, upon a promissory note dated at Toronto, Ontario, November 20, 1902, due in three months, made and signed by defendant Francis A. Hilton, payable to the order of I. G. Hilton, his wife, at Molson's Bank, Toronto. Plaintiff became owner of the note when, or shortly after, it was made, and discounted it at Molson's Bank. When it became due the bank protested it for nonpayment, and, having indorsed the same, plaintiff was subsequently obliged to pay the amount due upon it to the bank, again becoming owner of the paper. The note fell due on February 23, 1903. Defendants moved from Toronto to Detroit, Mich., on December 1, 1906, and have resided in that city ever since. Plaintiff is still a resident of Ontario. Under a plea of the general issue, defendants gave notice in defense that the note was barred by the Michigan statute of limitations, and that defendant I. G. Hilton was a married woman when she indorsed the same. Upon the trial, the genuineness of the note and plaintiff's ownership for value were not questioned. It was also conceded that when said note was given defendants were,

Digitized by Google

and yet remained, husband and wife, and that nothing had been paid upon the same by defendants since it fell due. The statutes of Ontario were introduced in evidence, from which it appeared that the statute of limitations in that jurisdiction is the same as that of Michigan, as applied to actions upon negotiable paper of the kind involved here, and under the Ontario law in force when defendant I. G. Hilton indorsed the note no disability existed as to her by reason of coverture. No testimony was introduced by the defense beyond proving the Canadian statute of limitations. After both parties rested, each asked the court for a directed verdict. The court directed a verdict in favor of plaintiff against defendant Francis A. Hilton for the amount of the note, but held that his wife, I. G. Hilton, was not liable, on the ground that she was under disability of coverture, and directed a verdict of no cause of action as to her. Defendant Francis A. Hilton and plaintiff each sued out a writ of error.

This peculiar situation brings in juxtaposition the two principles involved in the general rule that, in determining whether a domestic or foreign law is applicable in a case under consideration, the validity and construction of a contract are controlled and to be determined by the laws of the *situs*, or place where the contract was entered into, while the remedy for enforcing a foreign contract is regulated by the laws of the forum, or country where such remedy is pursued.

At the time defendants left Canada and moved to Detroit, this note had been past due some three years and nine months. Six years had not expired since they established their residence in Detroit before this action was brought. The statute of limitations had not run in either country. Defendants seek to tack the running of the statutes of limitations in Canada and Michigan which, combined, would bar action upon the note. This cannot be done. The Michigan statute of limita-

Digitized by Google

tions contains no special provisions recognizing the bar of limitations under the statute of a foreign jurisdiction, as is the case in some States, while even under such provisions to be effectual it must appear that the period fixed by the foreign statute had fully run and the bar there was complete before the defendant came within the jurisdiction of the State where the action was brought. 25 Cyc. p. 1241, and cases cited.

The Ontario statute of limitations forms no part of the contract here sued upon and out of which the right of action arises. The action is based on a common-law right entirely independent of the statute, which may or may not later act upon the remedy. The statute does not create the right itself, nor extinguish it, though it may through lapse of time bar, *ex post facto*, the remedy when pleaded. But laws relating to remedies on contracts are not a matter of comity. The rule is well settled by an abundant and long line of authority that remedies are governed and applied according to the law of the place where the action is instituted, rather than by the law of the place of the contract. The rule is clearly stated in Wood on Limitations (2d Ed.), vol. 1, § 8, and note, as follows:

"'Where an action is brought in one country or State upon a contract made in another, a plea of the statute of limitations existing in the place of contracts is not a good bar, but a plea of the statute existing in the country or State where the action is brought is.' This rule is in conformity with the universal rule that, as the statute operates merely upon the remedy, the law of the forum, and not the law of the *situs* of the contract, controls."

In the early and leading case of *Bulger* v. *Roche*, 28 Mass. (11 Pick.) 36 (22 Am. Dec. 359), where the debt was barred between the parties in a foreign jurisdiction by the law of that country before either left it, Chief Justice Shaw, in the concluding paragraphs of his illuminating discussion of the subject, says:

Digitized by Google

"The plaintiff, having a right to sue in our courts, must conform to our law, as to the time of bringing his action, and all other particulars affecting his remedy. That remedy is not barred or taken away by our statute of limitations, until six years have elapsed after both the plaintiff and the defendant have been within the jurisdiction of the commonwealth. How does the existence of a foreign law of the like kind, which would merely affect the remedy within its own jurisdiction, control or affect the statute of limitations which regulates the remedy here? The statute itself makes no such distinction, and none can be implied either from its letter or spirit."

This case, with others to the same effect, is cited and recognized as controlling in *Belden* v. *Blackman*, 118 Mich. 448 (76 N. W. 979), where it is said:

"Our statute is like that of Massachusetts and New York. The statutes of those States have been construed as applying to causes of action which accrued without the State between nonresidents (citing cases). We think the last-named cases should be followed here."

This rule is also recognized in *Blackburn* v. *Blackburn's Estate*, 124 Mich. 190 (82 N. W. 835, 83 Am. St. Rep. 325).

Defendants' contention that the ruling of the trial court is "anomalous" and introduces a "strange doctrine," because it is elementary that the cause of action accrued when the note fell due and a cause of action can accrue but once, while the statute of limitations having once started to run will continue, demands, to give it point, recognition of the Ontario statute of limitations and its application in combination with the Michigan statute to the case under consideration. Eliminating the foreign remedial statute, the strange doctrine vanishes. The cause of action has accrued but once in this State, and since then the statutory period of limitations has not intervened. In the absence of special statutory provisions, the law upon

Digitized by Google

the question is too well settled in this State, and elsewhere, to be questioned.

It is also well settled in this State, in harmony with the prevailing rule elsewhere, that foreign contracts, when the subject of litigation in this jurisdiction, are to be given effect, interpreted, and the contractual rights of the contending parties determined according to appropriate statutes and decisions of the territory where the contract was entered into, unless by some provision of the contract it is manifest the parties have otherwise intended and agreed. *Douglass* v. *Paine*, 141 Mich. 485 (104 N. W. 781). The promissory note upon which the action is based is clearly a foreign contract without qualification, intended to be performed where made. It was negotiated, dated, signed, indorsed, delivered, and made payable in Toronto, Ontario, where all parties in interest then resided. It was not paid there or elsewhere. Actions upon commercial paper are transitory, and the creditor may pursue and sue the debtor in any State where his person or property can be found; but the contractual rights of the parties are tested by the law of the place of contract, as before stated.

The trial court, referring to the disability of coverture in this State as applied to commercial paper, expressed a doubt as to whether "the rule of law is any different in the Province of Ontario than in Michigan, and for the purpose of this case" directed a verdict in favor of Mrs. Hilton.

The applicable statute of Ontario in force at the time this note was given provided as follows:

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in all respects as if she was a *feme sole*, and her husband need not be joined with her as a plaintiff or defendant, or be made a party to

Digitized by Google

any action or other legal proceeding brought by or taken against her. * * * Every contract entered into by a married woman on or after the 13th day of April, 1897, otherwise than as an agent (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, and it shall not be necessary in any proceeding to prove that she had any separate property at the time when such contract was entered into, or subsequently; (*b*) shall bind all separate property which she may at the time or thereafter possess or be entitled to; and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert, possess or be entitled to." R. S. Ont. 1897, chap. 163.

The doubt expressed by the trial court as to the law of that Province differing from ours may have arisen from a once somewhat unsettled condition of their decisions touching presumptions and burden of proof where a married woman executed or indorsed paper with or for the benefit of her husband. This uncertainty became marked in the case of *Cox* v. *Adams*, 35 Can. S. C. R. 393, where, out of a diversity of opinions by the justices, it was inferable that a wife so signing was presumed to have acted under undue influence or duress of her husband, and the burden of proof rested upon those relying upon her signature to prove that she did not. In *Stuart* v. *Bank of Montreal*, 41 Can. S. C. R. 516, the *Cox* v. *Adams Case* was discussed at length by different members of the court whose views were not altogether in harmony, and a majority of the court inclined to the view that it was a controlling precedent; but, on appeal of the case from the Supreme Court of Canada to the Privy Council of England, it was squarely held without hesitation, accepting the law as laid down in *Nedby* v. *Nedby*, 5 De G. & Sm. 377, that in case of husband and wife the burden

Digitized by Google

of proving duress or undue influence lies upon those who allege it. This rule as to burden of proof and presumption was also declared in the English case of *Field* v. *Sowle*, 4 Russ. 112, where the wife had joined her husband in a promissory note to plaintiff for money advanced by him to her husband. Undue influence and coercion were urged as a defense, with no other proof than coverture. The court there said:

"The signature of the promissory note by the defendant Sarah Sowle is *prima facie* evidence to charge her; and it is upon her to repel the effect of her signature by evidence of undue influence, and not upon the plaintiff to prove a negative."

Gold Medal Furniture Co. v. *Stephenson*, 10 D. L. R. 1 (1913), fully recognizes this rule of *prima facie* liability with citation of authorities; the court quoting with approval from *Talbot* v. *Van Boris*, 1 K. B. 854 (1911), which is an action against a wife upon joint and several promissory notes of her husband and herself signed by her as surety. It was there held that the only substantial defense of the wife was duress, and she was not relieved by the relation of husband and wife from the burden of proving it; that:

"To support such a defense, where the alleged duress is that of a person other than the person contracted with, it must be shown that the duress by which the contract was procured was known to the plaintiff when he entered into the contract."

It is manifest that under the law of Ontario the wife is liable on her indorsement with the same force and effect as though she were unmarried, in the absence of proof of duress or undue influence.

Proof of this note and her signature made out a *prima facie* case against Mrs. Hilton. No presumptions existed by reason of coverture which placed upon plaintiff the burden of proving a negative, and no evi-

Digitized by Google

dence was offered to meet the case made. Plaintiff was also entitled to a judgment against her.

For the reasons above given, the judgment rendered by the trial court herein is sustained and affirmed against said Francis A. Hilton, but reversed as to defendant I. G. Hilton, and a new trial granted plaintiff as to her.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

FALLS *v.* GRAND RAPIDS, GRAND HAVEN & MUSKEGON RAILWAY CO.

1. STREET RAILWAYS—WYE—DEFINITION.

A wye, as employed in the grant by a village council of the right to construct new track, meant a track with two legs, one joining the main track from one direction and the other joining the main track from a different direction.

2. SAME—REMOVAL OF TREES—CITIES—RIGHTS IN STREETS.

Where the common council of the village of Spring Lake authorized defendant railway company by resolution to lay a single track or wye, in a street to connect with existing track "and extend the same in a northerly direction across State street to, in, and upon" a lot adjoining complainant's property, and where, in so doing, because of the overhang of the cars, it became necessary to remove a shade tree in the portion of the street fronting upon complainant, the defendant was authorized to remove the tree, and the lower court rightly entered a decree giving complainant the option of transplanting the tree or cutting it down after thirty days' written notice.[1]

[1]On the right of municipal corporation to cut or trim trees within the limits of highway, see notes in 20 L. R. A. (N. S.) 809, 31 L. R. A. (N. S.) 951.

Digitized by Google

3. SAME.

A property owner who plants trees in the street does so with the understanding that they can remain there only so long as the space used is not required for public purposes.[1]

Appeal from Ottawa; Cross, J. Submitted October 21, 1915. (Docket No. 31.) Decided December 22, 1915.

Bill by Samuel Falls against the Grand Rapids, Grand Haven & Muskegon Railway Company for an injunction and other relief. From a decree for defendant, complainant appeals. Affirmed.

Lillie & Lillie, for complainant.

Carroll, Kirwin & Hollway, for defendant.

BROOKE, C. J. The learned circuit judge who heard this case filed the following findings:

"The bill of complaint in this cause was filed by the complainant against the defendant to secure an injunction to restrain the defendant from constructing its tracks in the streets in front of or across the property of the complainant.

"The proofs show that the complainant is the owner of lot 3, block 10, of Bryant's addition to the village of Spring Lake, Ottawa county, upon which lot is situated the dwelling house of the complainant. The defendant company operates an electric street railway along the street in front of the residence of the complainant, and, being desirous of erecting a depot in Spring Lake, purchased the lot adjoining the property of the complainant on the west.

"Upon the application of the company, the common council of Spring Lake passed an ordinance permitting the defendant to construct a wye in the street, and extending to and upon the lot purchased for depot purposes. The construction of this wye in accordance with the plans as shown by Exhibit A will not place the

[1]Generally, on ownership and control of trees in highway, see note in 15 L. R. A. 553.

Digitized by Google

track of the defendant upon the property of the complainant, but will require the removal of a shade tree which is located in the street in front of the lot of the complainant and about 18 inches east of his west line. The proofs show that the only damage which the complainant will suffer will be the annoyance of the operation of the cars and the removal of the shade tree from the street.

"Trees planted in the public highway by the abutting property owner can remain there only so long as the space occupied by them is not required for public use. The company having secured the permission from the common council to construct this wye, it necessarily follows that the company has the right to remove from the highway any obstruction which interferes with the proper construction and operation of the road. However, the tree is the property of the complainant, and he has the right to transplant it, or to cut it down, as he may decide, after proper notice has been served upon him to the effect that it is necessary that the tree be removed. No notice has been served upon him to remove the tree, and the temporary injunction heretofore issued will be continued until the defendant has given the complainant 30 days' written notice to remove the tree, at the expiration of which time, and upon filing due proof of the service thereof, the temporary injunction will be dissolved and the bill of complaint dismissed, without prejudice.

"Before the bill of complaint was filed the defendant by its officers informed the complainant that the track would cross the curb and the corner of his lot, but afterwards a survey was made, as shown by Exhibit A, and it was thereby ascertained that the track would not cross the property of the complainant. However, as the facts appeared to the complainant, he was justified in filing his bill of complaint, and he will therefore recover costs.

"A decree may be prepared for signature in accordance with these findings."

These findings were based primarily upon the fact that the common council of the village of Spring Lake passed a certain ordinance, the material parts of which follow:

Digitized by Google

"Section 1. The common council of the village of Spring Lake ordain that section 1 of said ordinance as aforesaid be and the same is hereby amended by adding thereto the following: Permission and authority is hereby given and granted to the said Grand Rapids, Grand Haven & Muskegon Railway Company to lay a single track or wye, as the said railway company may elect, in State street, a public street in said village, to connect with the track now laid in said street, and extend the same in a northerly direction across State street to, along and upon lot 2, block 10 of Bryant's addition to the village of Spring Lake, so that section 1 as amended shall read as follows:

"Section 1. * * * Permission and authority is hereby given to the grantee, to the said Grand Rapids, Grand Haven & Muskegon Railway Company, to lay a single track or wye, as the said railway may elect, in said State street, a public street in said village, to connect with the track now laid in said street and extend the same in a northerly direction across State street to, in and upon lot No. 2, block No. 10 of Bryant's addition to the village of Spring Lake.

"Approved and passed December 16, 1912."

The decree entered in the court below follows:

"This cause having come on to be heard upon the bill of complaint herein and the answer of the defendant thereto and the replication of the complainant to such answer and upon proofs duly taken in open court, the court, having heard the arguments of counsel for the respective parties, and being fully advised in the premises, does find that the complainant is the owner of lot 3, block 10 of Bryant's addition to the village of Spring Lake, Ottawa county, Mich., upon which lot is situated his dwelling house; that the defendant company operates an electric street railway along the street in front of the residence of the complainant, and, being desirous of erecting a depot in the village of Spring Lake, purchased the lot adjoining the property of the complainant on the west.

"The court does further find that upon application of the defendant company to the common council of the village of Spring Lake, said common council passed an ordinance, permitting the defendant to construct a wye

Digitized by Google

in the street extending to and upon the lot purchased by defendant as aforesaid, for depot purposes; that the construction of said wye in accordance with the plans as shown by Exhibit A on file herein will not place the track of the defendant upon the property of the complainant, but will require the removal of the shade tree which is located in the street in front of complainant's lot, and about 18 inches east of the west line of said lot.

"The court does further find that the only damage which complainant will suffer will be the annoyance of the operation of the cars and the removal of the said shade tree from the street, but that trees planted in the public highway by the abutting property owners can remain there only so long as the space occupied by them is not required for public use, and that, the defendant company having secured permission from the common council to construct its wye, it necessarily follows that defendant has the right to remove from the highway any obstructions which interfere with the proper construction and operation of its railway.

"The court does further find that said tree is the property of the complainant, and that he has the right to transplant it or cut it down as he may decide, after proper notice has been served upon him of the fact that it is necessary that the tree be removed, but that thus far no notice has been served upon him to remove said tree.

"It is therefore ordered, adjudged, and decreed by the court that the temporary injunction heretofore issued herein be continued in force and effect until the defendant has given the complainant 30 days' written notice to remove said tree; that at the expiration of said 30 days, and upon filing due proof of the service of said notice in this cause, the temporary injunction will be dissolved and the bill of complaint be dismissed without prejudice.

"It is further ordered, adjudged, and decreed by the court that, as complainant was informed by the officers of the defendant before the bill of complaint was filed herein that the track would cross the curb and the corner of his lot, but afterwards a survey was made, as shown by Exhibit A, and it was thereby as-

Digitized by Google

certained that the track would not cross the property of the complainant, complainant will recover his costs in this cause to be taxed; as the facts appeared to him, he was justified in filing his bill of complaint."

Complainant's position is sufficiently indicated by a short excerpt from the brief of his counsel. After citing the ordinance, he there says:

"This gave the defendant a right to extend a track across State street to lot 2. It gave the defendant a right to lay that track along lot 2. It gave the defendant a right to lay that track upon lot 2. The defendant could not lay that track anywheres in State street except to lay it along lot 2 and upon lot 2. To lay it along lot 2 it had to start from the west and go east in a northerly direction along and in front of lot 2. This is where it did go. This is where they laid it.

"This is all the authority that the common council gave the defendant. It nowhere gave them authority to start from the east and lay a single track or wye 'across State street to, along and upon lot 2.' It could not start from the east and go along lot 2. If it started from the east, it would have to go 'along' lot 3 and then upon lot 2. The common council gave no such authority.

"We presume that some argument will be made upon the fact that when section 1 was amended as authorized by that resolution, it read:

" 'The right to lay a single track or wye as the said railway company may elect, in State street, a public street in said village, to connect with the track now laid in said street, and extend the same in a northerly direction across State street to, and upon lot 2, block 10, Bryant's addition to the village of Spring Lake.'

"But the common council, when it authorized section 1 to be so amended, did, without doubt, make a mistake in leaving out the word 'along' in the expression, 'to, along and upon lot 2, block 10, Bryant's addition to the village of Spring Lake.' The only authority there was to amend section 1 was to give the defendant a right 'across State street, to, along and upon lot 2, block 10, Bryant's addition to the village of Spring

Digitized by Google

Lake.' The amendment of the franchise cannot be any greater in effect or force than the resolution which authorized its amendment.

"The testimony shows that it was understood that only the west leg of that wye should be put in, and that was to be put in along and upon lot 2. In our judgment the most that can be claimed for the resolution and the amended section of the franchise is that both are but a part of a single and entire scheme. The scheme was to allow the Interurban to lay it along and upon lot 2 as expressly provided in the resolution authorizing the amendment of section 1. It is true that section 1 was amended at that time, and probably, as said before, by a clerical error the word 'along' was left out."

We are of opinion that complainant's position is untenable. A "wye" is a term which necessarily means a track with two legs, one joining the main track from one direction, and the other joining the main track from another direction. The authority granted by the ordinance was "to lay a single track or wye," thus clearly indicating that the council distinguished one from the other, and empowered the company to select either method of construction it might desire.

The record clearly discloses that in constructing the wye as proposed by defendant company, no portion of the track to be laid encroaches upon the lot of the complainant, or upon that portion of the street lying between the front of his lot and the curb line. At its nearest point the track would be about 18 inches distant from the end of the curb in front of complainant's lot. As cars pass round the proposed track, however, the overhang of the cars would bring them in contact with the shade tree, which complainant has placed in the street in front of his lot near the curb. To permit construction in the manner proposed, it will necessitate the removal of this tree. Defendant offered to transplant said tree, or plant another of a like character where complainant desired, or to purchase from

Digitized by Google

complainant 10 feet off the west side of his lot. All of these propositions were declined by complainant, and he insisted and insists that he has an absolute right to prevent the construction of the wye in the manner proposed. We think his position is entirely untenable. It has been held in this court that, where an abutting property owner plants trees in the street he does so with the understanding that they can remain there only so long as the space used is not required for public use. *Miller* v. *Railway,* 125 Mich. 171 (84 N. W. 49, 51 L. R. A. 955, 84 Am. St. Rep. 569), and cases there cited.

In *Mannel* v. *Railway,* 139 Mich. 106 (102 N. W. 633), it was said:

"This court has held repeatedly that the use of the streets of a city for street railway purposes was not an additional servitude, and that the grant of a right to construct and operate a street railway, with all necessary poles, wires, side tracks, etc., along the public streets, was within the powers of the municipality granted by the legislature, and that the location and construction of the road and changes relative thereto within the limits of a city were subject to the control and approval of the municipal authority, provided that the railroad so constructed and operated would not be a public nuisance, or for any special reason require the interference of a court. *Detroit City Ry.* v. *Mills,* 85 Mich. 634 (48 N. W. 1007); *People* v. *Railway Co.,* 92 Mich. 522 (52 N. W. 1010) 16 L. R. A. 752."

The decree of the court below is affirmed, with costs.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

CLARK *v.* CLARK.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—PERSONAL INJURIES.

Claimant, a carpenter foreman, in the employ of his brother, participated in an altercation with certain teamsters who attempted to deliver some brick on the premises; the brother, who owned the property where the brick was unloaded, having directed claimant to prevent the delivery of brick there. Next day the trespasser returned with reinforcements and began another quarrel with the owner who prevailed over his opponent, but claimant was injured by a missile thrown by the attacking party while he was endeavoring to prevent interference on the part of the others with the controversy going on between the brother and his assailant. He volunteered the service he was trying to render. *Held*, that the injury was not received in the course of his employment so as to entitle claimant to compensation under Act No. 10, Extra Session 1912.

Certiorari to the Industrial Accident Board. Submitted October 27, 1915. (Docket No. 173.) Decided December 22, 1915.

Willis M. Clark presented his claim for compensation for injuries received in the employ of David S. Clark. From an award rendered said respondent and the Union Casualty Insurance Company bring certiorari. Reversed.

Walters & Hicks, for appellants.

Frederick J. Ward, for appellee.

BIRD, J. Claimant was a carpenter foreman in the employ of his brother, David Clark, who was erecting a dwelling on Churchill avenue, in the city of Detroit. David also owned the adjoining lot upon which he in-

Digitized by Google

tended to erect a dwelling, and had let the contract to excavate for the cellar. Claimant received instructions from him to permit no building materials for other dwellings being erected in the vicinity, to be deposited on the adjoining lot. On March 23d two men with a wagon load of bricks drove onto the adjoining lot and began unloading them. Claimant advised them that the bricks were not for his employer, and warned them to desist. They refused to obey the instructions, and then a fight ensued, in which claimant got the better of it. The following day the teamster returned with a reserve force, with the evident purpose of "getting even." Some intemperate language passed between them and claimant, who was at work on the rear porch. David overheard the talk in the basement, and came out and ordered them away. They refused to go, and he engaged in a fight with them. Claimant, thinking that his brother David needed help, went to his aid and kept back some of the reserve force, but did not himself engage in the fight. While so engaged, one of the assailants threw an iron missile and struck claimant in the eye, thereby permanently destroying the sight. Compensation was demanded by him under Act No. 10, Extra Session 1912. The insurance company refused to respond, and he thereupon made an application to the Industrial Accident Board. The claim took the usual course before the board, and resulted in allowance being made of $10 per week for 100 weeks. Respondents have brought the proceedings here for review, with the claim that the award should be set aside on the ground that the injury did not arise out of and in the course of claimant's employment within the meaning of said act.

The theory upon which claimant seeks to bring his claim under the statute, is that he received the injury while protecting his master's property against trespassers. Testifying as to his duties claimant said:

Digitized by Google

"I was in fact over all of the excavating, and from then on up until the work was finished, representing my brother when he wasn't there and when he was there."

Conceding claimant's authority and duty as are stated, he fails to make a satisfactory connection between them and his acts at the time he received the injury. Had he received the injury on the previous day while he was endeavoring to protect his master's property against trespassers, the connection would be obvious. That incident happened the previous day, and appeared to be a closed incident except for the ill feeling which it engendered. The following day the same parties reappeared, not for a like purpose as on the previous day, but evidently for the purpose of getting revenge, although they claimed to be in search of a lost work ticket. They assailed claimant with words only, but their attitude toward him was threatening. David overheard it and came out of the basement and took charge of the controversy himself. After he had engaged in the fight and appeared to be succeeding, claimant, who had been an observer, came unsolicited to his brother's aid by keeping off the reserve force, and while doing so was hit with a flying missile and injured. It may have been commendable in him to volunteer to assist his brother against such great odds, but that does not satisfactorily answer the question what connection his acts had with his employment. He was not called upon to protect his master's property, as on the previous day. He was not asked to assist his master in the fight on the second day. His action was purely a voluntary one, and it seems to us no different than as though he had discovered the same men fighting with his brother a week afterward ten blocks away, or as though claimant had observed a fight going on across the street and had gone there to get a better view, and while there had been hit by a

Digitized by Google

flying missile and injured. Had claimant remained at his work he would not have been injured. His presence at the place of fighting was in pursuance of no demand of his employment. Neither was it in aid of any material interest of his master. His presence there and the assistance which he rendered was solely in the interest of his master's personal safety. An injury received under such circumstances cannot be said, under a fair construction of the act, to have arisen out of and in the course of his employment. See *Collins* v. *Collins*, 2 Ir. R. (1907) 104; *Mitchinson* v. *Day Bros.*, 6 B. W. C. C. 190.

But claimant says he was in charge of his brother's work while he was away, and also while he was present. If his brother David were present and did not assume to act, claimant probably had the authority to act, but when the master was present, and took personal charge of the matter himself, it necessarily excludes the idea of claimant's having charge of it.

The finding of the Industrial Accident Board must be reversed, and the award set aside.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

DEEM v. KALAMAZOO PAPER CO.

MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD—WORKMEN'S COMPENSATION—EVIDENCE—QUESTION OF FACT.

Where evidence, in a workmen's compensation case, had a tendency to show that decedent suffered a severe fall

Digitized by Google

and injury to his head, and later fell a second time and was killed, and the medical testimony was in conflict as to whether the death resulted from concussion of the brain caused by his prior injury, or from heart trouble, from which it was claimed he had previously suffered, the finding and award of the Industrial Accident Board rested on an issue of fact and should be affirmed.

Certiorari to the Industrial Accident Board. Submitted October 21, 1915. (Docket No. 160.) Decided December 22, 1915.

Lizzie G. Deem presented her claim for compensation for the death of her husband while employed by the Kalamazoo Paper Company. From the award entered the respondent brings certiorari. Affirmed.

Alfred J. Mills, for appellant.

Charles H. Farrell, for appellee.

BIRD, J. William W. Deem, husband of claimant, had been employed by the Kalamazoo Paper Company for nearly 20 years prior to his death. During that time he had been in reasonably good health, and had lost very little time. For several years prior to his death he had acted in the capacity of "beater" engineer. On the morning of June 29, 1914, he was engaged in renewing the screen on one of the "beater" cylinders. To accomplish this he stood on a plank placed across the top of the "beater" tub. The plank extended about 18 inches beyond the edge of the tub. During the temporary absence of his helper he slipped or made a misstep on the wet plank and fell to the cement floor, striking on his head and right shoulder. He was picked up in an unconscious condition by the superintendent, but he regained consciousness soon after, and complained of being dizzy and of a pain in his right shoulder. His face was red and he tried to

Digitized by Google

vomit. Later he was assisted to a street car which carried him to his home. The family physician was called, and found him with a badly bruised head and shoulder. These were cared for by the doctor, and his recovery was rapid enough, so that on July 6th he returned to his work, and continued to work until his death. On the morning of July 16th he was seen to fall through the doorway leading from the "beater" room into the engine room. The engineer saw him, and went at once to his assistance, but found upon reaching him that he was dead.

A claim for compensation was filed with the Industrial Accident Board by his widow, alleging that deceased came to his death as a result of injuries received in a fall on June 29th. The matter received the attention of a board of arbitration, and she was given the statutory allowance of $3,000. An appeal to and reargument before the Industrial Accident Board resulted in an affirmance of the award. The claimant contended before the arbitration board that the deceased came to his death on July 16th as a result of concussion of the brain caused by his fall on June 29th. The claim was contested on the ground that death was caused by heart disease which had no connection with his injury, and, further, that the proofs left it to conjecture as to the cause of death.

It is obvious that the injury arose out of and in the course of deceased's employment, and, if his death was traceable to this injury, the award should be affirmed. To establish the fact that it was so traceable, claimant offered the testimony of Dr. Henwood, the family physician, who testified in part as follows:

"His death would be possible as the result of the blow he received on the 29th of June. From what I know of his condition, his physical condition on that morning when I examined him, I don't think there was anything else, as far as I know, that would prob-

Digitized by Google

ably cause that at that time. There was no organic trouble of any kind, to my knowledge. Assuming there may have been, it would be possible for it to have been accelerated by that injury, and death may have been hastened as a result of that injury."

He also testified that as a result of his examination and treatment it was his opinion that it was probable he died from the results of the blow, and that a period of two weeks was not an unusual time in which a concussion of the brain might produce its results.

Dr. Paul Butler, in answer to the hypothetical question as to the cause of death, answered that:

"Assuming for the purpose of this case that the facts are that he suffered from sleeplessness, loss of appetite, dizzy spells, I would say that he was suffering from concussion of the brain due to the original blow or injury of June 29th, or due to an injury, anyway."

And later this witness gave it as his opinion that death resulted from concussion caused by the injury.

Dr. Rush McNair, a witness for the respondent, admitted that from the description given by Dr. Henwood he "would judge there was some concussion."

As opposed to this, there was testimony which tended to show that the deceased had been troubled about three years prior to his death with a cardiac disturbance, and testimony was offered and received from which an inference might have been drawn that the deceased came to his death from that cause. The testimony of claimant, however, brought the question as to the cause of death into the domain of fact, and, as the Industrial Accident Board has passed upon the question of fact, and found that her claim was established, there is nothing left for us to do but to affirm the award.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

Digitized by Google

COLLINS v. COLLINS.

DIVORCE—EXTREME CRUELTY—ALIMONY.

Held, in a suit for divorce, that the complainant's testimony showing cruelty of her husband sustained the granting of a divorce, and that an award of alimony of $4,000 worth of realty, out of property worth $11,000, and $800 cash, with a solicitor's fee of $150, was not excessive.

Appeal from Van Buren; Des Voignes, J. Submitted October 19, 1915. (Docket No. 161.) Decided December 22, 1915.

Bill by Jennie Collins against William H. Collins for divorce. From a decree for complainant, defendant appeals. Affirmed.

James E. Chandler, for complainant.

W. J. Barnard, for defendant.

MOORE, J. From a decree of divorce with alimony in favor of the complainant, an appeal is taken to this court by the defendant. Defendant claims:

(1) There was no ground for divorce; and (2) that, if there was, the amount of alimony is excessive.

In his oral opinion the trial judge described the condition of the plaintiff as follows:

"She is now an invalid. She is afflicted with a rheumatic trouble wherein her arms are crippled. Her limbs or lower extremities are drawn back. She cannot raise her body on her feet. She is brought in this courtroom in a wheel chair, an invalid's chair; and that has not been done for effect. Any one looking at her hands can see their shriveled condition and all that. Outside of that she is a woman in apparently fair health."

Digitized by Google

The parties were married in October, 1874, and lived together until September, 1912, when complainant says she was afraid to live with defendant any longer. The complainant bore to the defendant nine children, eight of whom were living at the time of the trial. At the time of the marriage neither of them had any property. They began married life in one room. The defendant had employment in a rolling mill. Later they moved to South Chicago, where defendant was employed in the steel mills until 1909 or 1910. In 1911 he began to draw a pension of $81.25 a month from the steel company which it is expected will continue during life. In 1910 defendant bought 8 acres of land on the shore of a lake in Van Buren county, and built a house on it, at a cost of $3,500, which has been used as a home and a summer resort. Later 40 acres in the same township was bought at a cost of $1,000. The parties were hard-working, frugal people, and seem to have prospered financially and to get along very well together until after they moved to Van Buren county, although before that it is claimed defendant sometimes drank too heavily. Nearly ten years ago the plaintiff became an invalid, and was obliged to be lifted up and down and got about in a wheel chair. It is her claim that after they came to Van Buren county defendant tired of her and became enamored of one Jennie McDonald, and that his relations with her had become the subject of common talk. She testified in part as follows:

"I heard he was making visits to Mrs. McDonald. He was there pretty nearly all of the time they told me. I went to Chicago. I was sick the winter before, and went to Chicago to doctor, and while I was gone to Chicago she stayed in my house, her and her two children, with him, and her horse and cow was there. Mrs. McDonald stayed at my house; yes, sir. I know it because my daughter was there who was only a little over 17 at that time. * * *

Digitized by Google

"*Q.* During the time that you were living at Grand Junction on the place did your daughter Marie ever tell you anything that she had observed between your husband and Mrs. McDonald?

"*A.* Yes; she did tell me. I discussed the matter with my husband. Just before I left I told him about it. He had her in South Chicago for a week, too, across the lake. At the time I talked this matter over with my husband there was present of my children Stella and my son James and my husband. He was going to murder us, shoot us. I told him what he had been doing, and he had been with her all the time. And he wanted to know if I had proof of it, and I told him I did. I told him about being in the city with her, and he wanted me to name one, and I told him what Marie said. 'Your own daughter had seen things.' And he said, 'Well, she did, did she?' 'Why,' I says, 'You have got to leave Mrs. McDonald alone and keep away from her, or I can't live with you.' He says he will 'leave both of us,' he says; 'but,' he says, 'before I go, I will shoot the top of the head of John, the top of John's head off.' He has threatened me time and again, too. On the occasion of those threats he said he would get rid of us. He said he would come Bob on us; that is his brother. And his brother shot his wife and shot himself in Detroit. My husband had a shotgun—no revolver. The next day he went and got a revolver. * * * After he got in thick with her he went upstairs to sleep, and he would make out he was going to bed, and I would see him take his hat and coat and shoes after he took them off in the dining room and carry them in the front hall and leave them there, and get up and go out, because we have got up and seen him he wasn't in bed. That happened quite a few times. * * * His threats of violence towards me and other members of the family caused me to leave in dread and fear. I was always afraid of him since we come to the country here. Since he got in with her I was always afraid of him. I left the 7th of September, 1912. The next year I come back to Grand Junction and lived there during the summer; kept boarders.

"*Q.* Where was your husband at that time?

"*A.* Well, I heard he was down South; and she was with him, I heard.

Digitized by Google

"*Mr. Barnard:* I object to that, about her being with him down South.

"*Q.* Was she there about Grand Junction?

"*A.* No; she was gone the biggest part of the time. * * * I have been a wife to him right along. He didn't have to go, notwithstanding my ailment. Mrs. McDonald went to my house, and her daughter, and he pulled out a roll of money, and was counting it out, you know, and he stuck that under my nose and says, 'Smell that; that is your share of it.' And it was my share, too. They were getting all of his money. That was in the spring before I left in 1912. It was after getting his pension and getting the interest, you know, and he had all that money together, and he was showing what he had, and he rolled it up and stuck it under my nose and said, 'Smell that; that is your share of it.' John and Stella was there, Mrs. McDonald and her daughter."

She also testified to other threats.

One of his daughters testified in part:

"I heard my father say his brother Bob could use the gun, and he could, too. He would clean out the bunch of us. Robert was the man who killed his wife and himself in Detroit. By that I understood my father was going to shoot up the crowd there. At that time Stella, my sister, Jim and I and mother and a few resorters were there. That was the fall that mother left. I never had heard him make any threats before that. The day we left he went to Kalamazoo. The day that we were afraid of him he said he was going to get what he called heavy artillery, and mother was afraid, so that is the day we left. The night before we left he was up all night and searched around, and didn't go to bed at all. I heard him say he was going to get rid of three or four. My mother was talking with him about his intimacy with Mrs. McDonald, and told him about what Marie had seen; that Marie had reported that she had seen him coming out of the barn together. Ma told Daddy that the night before she left, and he says: 'You should not believe what a child says; you have got the child scared into saying that.' That is the time he made threats and kicked the chairs around. My sister Stella, my brother James,

Digitized by Google

and some resorters were there at that time. John took mother away at that time, and the rest of us all went. We took her away because of the threats that had been made there and what had happened, because we were afraid to leave her there. She wanted to go. She said she was afraid."

A grandson testified, in substance, that while he was at work in South Haven he saw the defendant come off the Chicago boat.

"I saw Mr. Collins and Mrs. McDonald go from the boat dock towards the Michigan Central depot, and Mr. Collins was carrying two grips."

A daughter testified:

"In August, 1912, I remember my father being in Chicago about a week. He said he was going to Chicago. Mother asked him. He said he was going for a good time. I heard afterwards from Harvey Collins that my father and Mrs. McDonald had been seen together on the streets of South Haven, and that was the time of his return from his week's absence. Yes."

A daughter testified:

"I lived with my father and mother at Grand Junction. I know my father used to stop at Mrs. McDonald's quite often, and when he took us to town he would go and buy groceries to the store and take them in to her, and I never saw him take any change from her there."

Another witness testified he had seen defendant at the McDonald premises several times, and that defendant paid him for chickens which by the order of defendant he delivered to Mrs. McDonald.

Another witness testified that after Mrs. Collins went away he saw Mrs. McDonald and defendant go towards the Collins place four or five times, that they would be gone a half hour or longer, and that he had seen defendant at Mrs. McDonald's place a number of times.

Digitized by Google

A paper was produced in the handwriting of defendant addressed to his brother, in which, after making reference to his family troubles, the following occurred:

"Now, I have not written this to cover up any of my shortcomings, but will say that my Creator has given me passion that may have led me along paths I should not go, but, if I did not have an invalid wife, I might not have wandered away along strange paths."

At the close of the testimony offered on the part of complainant counsel for defendant said: "I don't care to introduce any defense."

When the judge was delivering an oral opinion indicating what he intended to do, counsel said:

"I want it to appear on this record now that the answer denies any stock in the United States Steel Corporation, and we offered, if the court thought we owned any stock, to make a decree giving her part of it, and that we also offered to have all the property sold and equally divided."

We think the court was justified in granting a decree of divorce. *Briggs* v. *Briggs*, 20 Mich. 34; *Palmer* v. *Palmer*, 45 Mich. 150 (7 N. W. 760, 40 Am. Rep. 461); *Nicholas* v. *Nicholas*, 50 Mich. 162 (15 N. W. 64); *Hoyt* v. *Hoyt*, 56 Mich. 50 (22 N. W. 105); *Bailey* v. *Bailey*, 121 Mich. 236 (80 N. W. 32).

We now come to a more troublesome branch of the case, and that is the question of alimony. We have already shown the physical condition of the complainant and that defendant is assured a monthly pension of $81.25, presumably during life. The bill of complaint charges that defendant owns the Saddle Lake property, worth, with the buildings upon it, $4,000, and 40 acres of land worth $1,000, two lots on Avenue L, Chicago, worth $4,000, and three lots on Ewing avenue worth $3,000, and $4,000 of stock of the Illinois Steel Company. The answer avers he has turned

Digitized by Google

over two lots to complainant worth $3,000, admits the property on Avenue L is worth $3,000, and admits the Van Buren county real estate is worth $4,000. He denies he owns any steel stock. This denial is not under oath.

The complainant testified that defendant had not turned over to her any real estate, and that she wanted the Van Buren county property as a home, and also because, with the assistance of her son, she could earn with it a living. She also testified to the ownership of the steel stock by defendant, and that as late as in 1912 she knew of the defendant drawing dividends on the steel company stock.

In September, 1910, the South Chicago Savings Bank wrote defendant acknowledging the payment of a $2,000 note, the letter closing:

"We hold collateral consisting of 35 shares United States Steel Corporation Pfd. stock subject to your order."

November 8, 1911, defendant made another loan at the same bank, and pledged 35 shares United States Steel Company's stock as collateral, and this note was paid February 5, 1912. While defendant made in his unsworn answer a denial of owning this stock, he did not come into court and tell the judge when and for what price he sold it.

Under all the circumstances shown by this record we think we will not disturb the decree awarding the complainant the Van Buren county property, including the equipment of the summer resort property, alimony in the sum of $800, and a solicitor's fee of $150.

It is affirmed, with costs.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

Digitized by Google

KEARNEY *v.* BOARD OF STATE AUDITORS.

HORTON *v.* SAME.

1. PUBLIC OFFICERS—CONSTITUTIONAL LAW—INCREASE OF SALARY—TERM OF OFFICE—STATE TAX COMMISSION.

   Act No. 331, Pub. Acts 1913, requiring the State tax commission to devote their entire time to the duties of their respective offices, and increasing the salary of each commissioner from $2,500 to $3,500 per annum, adds no new duties to the official obligations theretofore existing, and, even if it did, could not lawfully provide for additional compensation in violation of Art. xvi, § 3, of the State Constitution.

2. CONSTITUTIONAL LAW—STATE TAX COMMISSION.

   Under the constitutional prohibition against increasing salaries of public officers after election or appointment, interpreted in the light of the Constitution of 1850 and the debates in the constitutional convention, which indicate the intention to re-enact a clause contained in the former Constitution without substantial modification, the salaries of the State tax commissioners could not be increased during the term of office for which they were elected, and the provision could not be evaded by their resigning and securing a new appointment to the commission during the period for which the appointments were originally made. The office of tax commissioner has a fixed term of six years, to which this constitutional measure was intended to be applicable.

Mandamus by Thomas D. Kearney and by George B. Horton against the Board of State Auditors to compel respondents to audit payrolls of relators in accordance with an act increasing their salaries. Submitted October 28, 1915. (Calendar Nos. 26,841, 26,842.) Writs denied December 22, 1915.

Digitized by Google

Shields & Silsbee, for relators.

Grant Fellows, Attorney General, and *L. W. Carr* and *Clare Retan,* Assistant Attorneys General, for respondent.

PER CURIAM. Relators in the above-entitled cases are members of the State tax commission of Michigan by gubernatorial appointment. The office is appointive, with a full term of six years. Each first became a member of the commission by appointment for a full term. Relator Horton was appointed and entered upon the duties of his office January, 1911, and relator Kearney two years later. Except as hereafter stated, they have been continuously members of said commission ever since. Their respective terms will expire in January, 1917, and January, 1919. When each entered upon the duties of his office, his salary, as fixed by statute, was $2,500 per annum. Other than the dates of their first appointments, the facts and questions of law involved are substantially alike in both cases, which are briefed and submitted together.

In 1913 the legislature passed an act (Act No. 331, Pub. Acts 1913) entitled:

"An act to fix the salary and provide for the expenses of the board of State tax commissioners."

The material part of said act is as follows:

"SECTION 1. Hereafter the members of the board of State tax commissioners shall each receive an annual salary of three thousand five hundred dollars, which shall be paid out of the general fund in the State treasury. The members of said board shall also receive all expenses actually and necessarily incurred in the performance of official duties, all of which shall be audited and allowed by the board of State auditors and paid from said general fund: *Provided, however,* that the members of said board shall devote their entire time to the duties of their respective offices."

Digitized by Google

While it may imply more time than formerly should be devoted to those which exist, this act adds no new duties; and, if it did, extra compensation cannot be provided for additional duties within the scope of and germane to the office without violating a constitutional provision forbidding increase in salary after election or appointment, or during the then term of office. *Moore* v. *Nation*, 80 Kan. 672 (103 Pac. 107, 23 L. R. A. [N. S.] 1115, 18 Am. & Eng. Ann. Cas. 397); *United States* v. *King*, 147 U. S. 676 (13 Sup. Ct. 439); *Evans* v. *City of Trenton*, 24 N. J. Law, 764.

Until April, 1915, relators continued to draw their salaries at the rate of $2,500 per annum. On April 27, 1915, both presented their resignations to the governor, which were accepted upon the day they were presented. On the following day, April 28th, both relators were reappointed to the same respective terms and offices from which they had resigned. Their appointments were thereafter confirmed by the State senate, and commissions were at once issued to them under their reappointments. Relator Kearney again took and filed the constitutional oath of office on April 29 and relator Horton on April 30, 1915. Both thereafter claimed that during the balance of the terms to which they were originally appointed, and reappointed to fill vacancies created by their resignations, they were entitled to the annual salary of $3,500, as provided by said Act No. 331, Pub. Acts 1913. Having asked and received from the attorney general an opinion unfavorable to this claim, the State board of auditors declined to audit and allow relators' salaries at the increased rate, taking the position that they were not entitled to the benefit of such increase until the expiration of the terms for which they were originally appointed, for the reason that section 3, art. 16, of the State Constitution of 1909 prohibits increasing

Digitized by Google

salaries of public officers after their election or appointment. The board did, however, audit the salaries of relators at the rate of $2,500 per annum, as before. After due demand and refusal, these petitions for mandamus were filed to compel the State board of auditors to audit and allow relators' salaries at the rate of $3,500 per annum after the dates they qualified under reappointment, according to the pay roll of said commission as prepared and presented. Orders to show cause were granted and answers filed properly putting the question involved at issue.

It is conceded that members of the board of State tax commissioners are public officers within the meaning of the Constitution, and, had relators continued in office under their original appointments for the terms they are now filling, the constitutional prohibition would preclude their receiving an increase of salary. It is urged, however, that when they resigned and their resignations were accepted, their tenure ended, and there was an absolute vacancy in the office, which the governor could fill by the appointment of any incumbent he chose; that, when he saw fit to appoint them, and they accepted, they began a new tenure of office as independent of and distinct from their former tenure as though other persons had been appointed, entirely free from the constitutional restriction urged by respondent. The ground for this contention is the less lucid phraseology of the prohibition in our present Constitution than that found in the preceding one, or generally in the legislation and Constitutions of other States restricting changes in salaries of incumbents of office. Section 3, art. 16, of the Constitution of 1909, so far as material, provides:

"Salaries of public officers, except circuit judges, shall not be increased nor shall the salary of any public officer be decreased after election or appointment."

Digitized by Google

The prohibition in our former Constitution of 1850 (Schedule, § 20) is as follows:

"And it shall not be lawful hereafter for the legislature to increase or diminish the compensation of any officer during the term for which he is elected or appointed."

Restrictive provisions of this nature are very common in the Constitutions, and legislation of the several States and the general attitude of the courts sustaining them as obviously wise and beneficial restraints which may not be evaded by any subterfuge has become text-book law based upon abundant decisions. Mechem on Public Officers, § 858; Throop on Public Officers, § 465; 29 Cyc. pp. 1427, 1428. The prevalent form of such restrictions prohibits change of compensation during the term for which the officer was elected or appointed or, in some cases yet more specific, after election or appointment and during the term for which the incumbent is elected or appointed.

It is pointed out that the restrictive clause in our present Constitution makes no mention of any *term*, and that the omission to adopt familiar phraseology, including the term, which has frequently been construed by various courts, permits the course pursued in this case, and by fair construction indicates an intent to apply the restriction only to an incumbent while he continued in office under a particular election or appointment, regardless of any *term* for which he was elected or appointed; it being said:

"It is therefore very evident that the constitutional convention made a distinct change in the phraseology, and necessarily must have intended to make a distinct change in the provision."

It is evident that the phraseology in the present Constitution is changed from the well-seasoned and often construed wording of our former Constitution, harmonizing with that most commonly found in other

Digitized by Google

constitutional provisions or legislation upon this subject, and it may be conceded that the change has rendered the provision, unaided by context, less complete and more obscure in substituting "after election or appointment" for "during the term for which he is elected or appointed." While the occasion for this change in wording is not readily apparent, neither is it apparent from the language used, construed in the light of the context and convention debates, that there was any intention to limit the scope of the former inhibition, except as to circuit judges. No one would accept strict construction and the literal meaning of this provision, if it has a meaning standing alone and exactly as it reads. If, as it reads, the salary of any public officer cannot be increased or decreased "after election or appointment," then by it, at the time of their first appointment, the status of relators was fixed in that particular for life, or so long as and whenever they might hold that office.

It is a maxim that the object of construction, as applied to a written Constitution, is to ultimately ascertain and give effect to the intent of the people in adopting it. The language here used calls for implications, being neither sufficiently precise nor complete in itself to make plain the intent without them. Implied constitutional restraints upon the legislative power are sometimes ascertained to be as manifest and effectual as those directly expressed in the language employed. *Rathbone* v. *Wirth*, 150 N. Y. 459 (45 N. E. 15, 34 L. R. A. 408). Resort may therefore be had not only to the indicated object sought to be accomplished and the mischief to be guarded against, which has been too often and abundantly reviewed by courts of last resort to need discussion here, but it is also permissible to examine the proceedings of the convention which framed the Constitution. The convention debates disclose that the member who introduced the

Digitized by Google

clause made reference to, and manifestly was moved by, the prohibition in the Constitution of 1850, expressing himself as advocating some provision of like kind in the organic law "to prevent that tampering with salaries," referring in subsequent remarks upon the subject to increasing or decreasing salaries of officers during their terms. The only matter relating to this clause discussed at any length was a proposed exception from its provisions in favor of circuit judges, there being a diversity of opinion upon that question which delayed its passage. Otherwise we find no suggestion of opposition to the clause or manifestation of an inclination to modify the restrictions of the former provision which it was to succeed. That such was the understanding of its meaning and intention of those who framed the Constitution is confirmed by their official address to the people of the State upon the subject. The act under which the constitutional convention was convened required that before adjournment it should prepare and adopt an address to the people of the State "explaining the proposed changes in the present Constitution, and the reasons for such changes, and such other matters as to the convention shall seem advisable." A committee "On Submission and Address to the People" prepared and submitted the required address to the convention, which approved and adopted it. Of section 3, art. 16, the address to the people says:

"This revises section 21 of article 4 and section 20 of the Schedule of the present Constitution making no material change, except as indicated by the words in italics."

In the clause under consideration here the only words in italics are "*except circuit judges.*" Convention Debates, vol. 2, p. 1441.

While the Constitution derives its force from the people who ratify it, rather than from the convention

Digitized by Google

which framed it, it is fairly inferable under such circumstances that this clause was accepted by the electors with the understanding and intent that the inhibition of the former Constitution should be and is retained in substance and with the same meaning, except as to circuit judges.

An attribute of the office to which relators were appointed is a fixed term. The statute creating the office gives appointees a vested right as incumbents for a stated period, and provides that, when appointed and qualified, they "shall hold office six years," and until successors are appointed and qualify. Relators were first appointed for the full term in which they are yet serving, and, after their resignations, were at once reappointed for the "unexpired term" of the period of time included in their earlier appointment. While the word "term" applies to the office, rather than the person holding it, after his election or appointment the right of tenure for the term attaches to him, and in common thought and parlance the office and term together become an attribute of and characterise the incumbent during the time for which he is entitled to the office. To hold that he may acquire added rights by simply withdrawing from and again resuming his incumbency for that term, through whatever agency, is subversive of the spirit, if not the letter, of this constitutional provision and contrary to the fundamental principles of public policy underlying constitutional and statutory restrictions of this character.

In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished. With due regard to the generally recognized purpose of such provision, and in view of the circumstances attending its framing and adoption, we think it can fairly be inter-

Digitized by Google

preted as indicating an intent on the part of those adopting the new Constitution to make "no material change" in restrictions from the provisions contained in the old, except as to circuit judges; that the intent and purpose sought to be accomplished were the same as the old indicated and provided for, and the clause reasonably may and should be so construed. If so, the incumbent, after his appointment to an office with a fixed term, cannot evade its provisions by resigning and being again appointed for the remainder of such term, thus accomplishing by indirection what cannot be done directly and what it was intended by the prohibition to prevent. *Greene* v. *Freeholders of Hudson County*, 44 N. J. Law, 388.

In support of the contention that our Constitution, as now worded, permits a change of salary whenever a new appointment is made, though the same incumbent is appointed, *Smith* v. *City of Waterbury*, 54 Conn. 174 (7 Atl. 17), is cited, and attention is directed to the constitution of that State (Const. Amend. art. 24), which prohibits extra compensation or increased pay to any public officer "to take effect during the continuance in office of any person whose salary might be increased thereby." In the case cited the salary of a city attorney was involved, and the statute was silent as to his term of office, but the judge by whom he was appointed held his office for two years, and, in making the appointment, fixed the term of the city attorney for two years, at the expiration of which period a new appointment was made. The court adopted the view that the appointee, when so appointed, would hold office for at least the same time as the judge who appointed him, and that "his term of office was practically the same." Thus viewing the nature of his tenure, the court held that a city attorney who, "in fact, under such an appointment, had held his office for two years," and when that term expired was again ap-

Digitized by Google

pointed for two years, held by virtue of his last appointment, and thereafter was entitled to an increase of salary previously provided. That proposition is not, as we construe the decision, open to dispute or in point here. The court held the incumbent's term was, in fact, under the circumstances shown, for two years, and when reappointed at the end of that time for two years more he entered upon a new term holding "under that appointment, and not under the appointment previously made," the limit of which was past. Were he claiming increased compensation for the unexpired balance of a two-year term, on the strength of having resigned and been immediately reappointed, the case would nearer quadrate with this, and it is possible to infer from the views expressed by that court in *Garvie* v. *Hartford,* 54 Conn. 440 (7 Atl. 723), that under such a state of facts a different result might have been reached.

The constitution of Pennsylvania contains a restrictive clause that "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment," being identical with the present Michigan provision in the particular upon which relators rely—not in express words prohibiting change during the *term* for which the officer was elected or appointed. In *Guldin* v. *Schuylkill County,* 149 Pa. 210 (24 Atl. 171), an act of the legislature changing the compensation of county coroners was before the court. The coroner's term of office was two years. It was held that the constitutional provision above quoted protected the coroner after his election from reduction of his emoluments by law during the term for which he had been elected. Conversely, by the same construction, the State is entitled to the same protection against increasing his emoluments.

We are well satisfied that by fair implication and

Digitized by Google

manifest intent of those who framed and adopted the constitutional provision under consideration, it comprehends in application both officer and term, considered together, where the term is fixed by law, and after his election or appointment for a specified term his relation to that term, in the matter of compensation while an incumbent, cannot be evaded by resignation and reappointment.

The writs of mandamus applied for in these cases are therefore denied.

KENNEDY *v.* VAN BUREN COUNTY DRAIN COMMISSIONER.

1. DRAINS—NECESSITY—DUTIES OF TOWNSHIP CLERK—DEPUTY.
   The office of deputy clerk of a township is one authorized by the statute, and unless his powers are limited by the statute he may perform any act which his principal may perform. And, hence, in a suit to enjoin the deepening and widening of a drain and preserve the level of an inland lake, the determination of the deputy clerk, acting with the justices of the peace as town board, that the drain was a necessary public improvement, was lawful and sufficient, as he was the representative of the township clerk.

2. SAME—INLAND LAKES—NECESSITY FOR IMPROVEMENT.
   Under Act No. 202, Pub. Acts 1911, the drain commissioner is not without authority to perform his duties and to deepen and widen a public drain because it would affect the level of an inland lake, the statute containing no provision against the lowering of such waters and the provisions thereof being optional rather than mandatory.

Appeal from Van Buren; Des Voignes, J. Submit-

Digitized by Google

ted April 24, 1914. (Docket No. 122.) Decided January 3, 1916.

Bill by Ellis Kennedy and others against George Mutchler, drain commissioner of Van Buren county, and others, for an injunction and other relief. From a decree dismissing the bill of complaint, complainants appeal. Affirmed.

Thos. J. Cavanaugh, for complainants.

Earl L. Burhans, Prosecuting Attorney, and *Lynn J. Lewis,* Assistant Prosecuting Attorney (*Glenn E. Warner,* of counsel), for defendants.

BIRD, J. The bill in this case was filed to restrain the drain commissioner of Van Buren county from acting favorably on a petition to clean out, deepen, widen, straighten, and extend School Section Lake drain. It is asserted that if the work contemplated under this petition were carried to completion it would lower the normal water level in School Section Lake two feet and ten inches. Complainants are owners of lands adjoining the lake, and therein lies the reason for their opposition to the proceedings.

The points raised against the proceedings by complainants question the jurisdiction of the drain commissioner on two grounds:

1. The petition was filed with the drain commissioner and was afterwards, in accordance with Act No. 185, Pub. Acts 1911, referred to the township board to determine the necessity for the improvement. At the meeting of the board which considered the matter, there were present two justices of the peace and the deputy township clerk. It was decided that the improvement was necessary. The claim is made that the deputy clerk could not legally act for his principal in passing upon this matter, because it was in its na-

Digitized by Google

ture a judicial proceeding; that when the law designates the clerk to act in such a capacity, it means the clerk, and not the deputy clerk.

The office of deputy clerk is one authorized by the statute (1 Comp. Laws, § 2342), and unless his powers are limited by the statute, he may perform any act which his principal may perform. *Dorr* v. *Clerk*, 7 Mich. 310; *Andres* v. *Circuit Judge*, 77 Mich. 85 (43 N. W. 857, 6 L. R. A. 238); *Tower* v. *Welker*, 93 Mich. 332 (53 N. W. 527); *Yale State Bank* v. *Fletcher*, 173 Mich. 585 (139 N. W. 1028). It was doubtless well understood by the legislature that the township clerk could not always be at his office to serve the public in his official capacity, and by reason thereof, he was authorized to appoint a deputy clerk to act in his stead in order to expedite public business, with no limitations on his powers to represent his principal. In view of this we must hold that the deputy clerk was qualified to sit as a member of the township board to consider and pass upon the application in question.

The case of *Dubois* v. *Riley Township Board*, 126 Mich. 587 (85 N. W. 1067), is cited as being opposed to this view. It is true that case denied the right of the deputy to act in the place of his principal, but it was placed upon the ground that the clerk himself was disqualified from sitting by reason of his having sat in the same matter on a former appeal. Had it been conceded in that case that the clerk was qualified to sit, then it would have raised the question here presented.

2. The jurisdiction of the commissioner is again challenged on the ground that the township board had no power to find the necessity for an improvement, which, if carried to completion, would affect the normal level of an inland lake such as the one in question. The basis of this contention is Act No. 202, Pub. Acts 1911. The title provides:

"An act to authorize boards of supervisors in cer-

Digitized by Google

tain counties to determine the natural height and level of the waters in navigable inland lakes, to maintain the waters in navigable inland lakes at their natural height and level, to build dams and embankments and acquire for such purposes by condemnation, or otherwise, lands, easements or other property, to appropriate moneys therefor, and to assess the expenses of such improvements on property benefited thereby."

Section 1 reads:

"The board of supervisors of any county in which the whole or major part of the waters of any inland navigable lake is situated, may, in order to improve or maintain navigation thereon, or to promote the public health or welfare, determine the natural height and level of the waters in such inland navigable lake, and construct and maintain sufficient dams or embankments upon and along the shores of such lake to keep and maintain the water in such lake at its natural height and level."

Section 2 reads:

"Such board of supervisors may acquire, in the name of the county, by gift or purchase, or by condemnation proceedings, any existing dam which may affect the level of the waters in such lake, and any or all sites for dams or embankments or other lands, easements, property, or interests therein, or appertaining thereto, needful or convenient in order to fully carry out the purposes of this act."

The remaining sections of the act set forth the machinery by which such property or rights may be purchased or acquired by condemnation. Act No. 202 confers upon boards of supervisors of the several counties the authority to establish the normal water level of inland lakes, and to purchase or condemn property and rights needful to maintain such level. The act does not appear to be mandatory, but merely optional with the several boards whether they shall assume jurisdiction in any particular case. Had the legislature provided that the waters of inland lakes should remain

Digitized by Google

at their present level, unless changed by the board of supervisors, or had it used some language indicating an intention to place the whole subject-matter at once under the jurisdiction and control of the board, the construction contended for by counsel would have more force. Our conclusion is that the act does nothing more than to confer upon the board of supervisors the authority to act in any given case where, in its judgment, it is necessary or expedient.

Under this view, the act will not stand in the way of proceedings under the drain law, where it affects the waters of an inland lake, unless the board has previously exercised its jurisdiction with respect to that particular lake.

The decree of the trial court dissolving the injunction and dismissing the bill will be affirmed, with costs to the defendants.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

APHORESMENOS *v.* McINTOSH.

1. MASTER AND SERVANT—UNSAFE PLACE—DISOBEYING ORDERS.

A decedent who had been ordered, in the process of wrecking a building, to dig a trench and not to dig below the footings, but who went too deep, causing the concrete wall adjacent to it to tilt towards him, was guilty of negligence barring his recovery for injuries that he sustained, and without some affirmative proof that he misunderstood

Digitized by Google

orders, because of his ignorance of the English language, his estate could not recover on the theory of failure to provide a safe place.

2. SAME—EXCEPTIONS TO RULE OF SAFE PLACE.

Where the servant is engaged in making his own place to work, or where he creates a dangerous situation as an incident of the work he is doing, the master is not chargeable with failure to provide a safe place. And there was no occasion to warn deceased of a danger which could only arise from disobedience of the employer's instructions.

3. WITNESSES—EVIDENCE—CROSS-EXAMINATION.

The fact that defendant was called for cross-examination under Act No. 307, Pub. Acts 1909, did not, where there was no contradictory evidence, deprive his testimony of its weight, but it was entitled to the same force or effect as it would have had if he had been called as a witness in his own behalf.

Error to Muskegon; Sullivan, J. Submitted April 20, 1914. (Docket No. 83.) Decided January 3, 1916.

Case by Christ Aphoresmenos, as administrator of the estate of Frank Aphoresmenos, deceased, against Alexander McIntosh, for injuries resulting in the death of plaintiff's decedent. Judgment for defendant on a verdict directed by the court. Plaintiff brings error. Affirmed.

Turner & Turner, for appellant.

Cross, Vanderwerp, Foote & Ross, for appellee.

BIRD, J. Defendant was engaged at Muskegon in the work of razing an old brick and cement building preparatory to the erection of a new one. The brick had been removed, leaving a cement wall and a footing upon which it rested. The wall and footing together were from three to five feet in height. The wall was one foot thick, and the footing was two feet

Digitized by Google

thick. The process of removing the cement was to dig a trench along the outer wall to the depth of the footing, and then break up the concrete and roll the pieces into the trench. Plaintiff's intestate was employed as a common laborer, and was set to work by the foreman digging the trench. He and his companion dug it below the footing, which caused the concrete to tilt to an angle of 45 degrees toward him. Presumably in an effort to protect himself, when he observed the concrete moving toward him, he placed his shovel blade against the concrete and the handle against himself, and he was thereby forced against the outer wall of the trench and injured so badly that he died the second day thereafter.

Defendant was charged with negligence in failing to provide a safe place for plaintiff to work. After the trial judge had heard the plaintiff's proofs, he directed a verdict for the defendant, on the ground that the doctrine of safe place was not applicable to the facts proven, and because plaintiff assumed the risk. The assignments of error raise the one question whether the trial court was in error in controlling the verdict.

The trial court was of the opinion that the rule of safe place was not involved, inasmuch as the plaintiff was engaged in making his own place in which to work. The general rule is well settled that a master must at his peril provide his servants with a reasonably safe place in which to work, but there are exceptions to that rule. Where the unsafe place is made by the servant himself, or where the unsafe place is created as an incident of the work being performed by the servant and his colaborer, the master is not liable. *Petaja* v. *Mining Co.*, 106 Mich. 463 (64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505); *Welch* v. *Brainard*, 108 Mich. 38 (65 N. W. 667); *Livingstone* v. *Plate Glass Co.*, 146 Mich. 236

Digitized by Google

(109 N. W. 431); *Strepanski* v. *Plaster Co.*, 162 Mich. 696 (127 N. W. 706).

The uncontradicted testimony is that the deceased and his colaborer were instructed by the defendant to dig the trench no deeper than the footing, and, had the instructions been followed, the concrete would not have tilted over toward him. The place was reasonably safe until it was made unsafe by disobeying the orders of the master. Under such circumstances the plaintiff is in no position to insist that his intestate received his injuries through the negligence of the master. Plaintiff's intestate was of foreign birth, and did not readily speak and understand our language, and it is urged that it was not made clear to him what the instructions and dangers were. It appears that the deceased had worked as a common laborer for the defendant for two weeks or more, and it does not appear that he had had any difficulty in understanding defendant's orders, and it does not appear that either he or his colaborer failed to understand defendant's orders on this occasion. And there was no occasion for defendant to warn the deceased of dangers which could arise only by disobeying his instructions. We agree with the trial court that the case falls within the principle of the cases cited, and that no negligence was shown upon the part of the defendant.

Plaintiff's counsel called defendant for cross-examination under Act No. 307, Pub. Acts 1909. After giving testimony at length upon the material phases of the case, which testimony was not afterward contradicted, counsel assert that the plaintiff is not bound by it. Testimony developed in this manner may be contradicted and overcome by other testimony, but its effect cannot be destroyed or put aside by mere assertion. Defendant's testimony so developed stood in no different position in the case than it would had it been

Digitized by Google

called out by cross-examination after he had taken the stand in his own behalf.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

VOORHEES *v.* NELSON.

1. DURESS—THREAT OF PROSECUTION—CONTRACTS.
   Threats of prosecution, unaccompanied by any threat of immediate imprisonment, do not amount to duress.

2. SAME—ILLEGAL TRANSACTION.
   Where plaintiff entered into a fraudulent transaction with several others to wager money on a horse, understanding that the opposing jockey had been bribed to throw the race to the horse on which plaintiff was betting, but the race did not result as they anticipated, and where defendant N. had been induced by plaintiff to become a party to the fraud and he also placed a considerable sum on the losing horse, and where defendant's agent whom he sent to plaintiff to obtain a settlement after learning that plaintiff had shared in the amounts secured from defendant, made threats of prosecution which intimidated plaintiff and caused him to pay defendant a large sum in settlement of the unlawful transaction, plaintiff not paying the money to defendant until several days had elapsed, but claiming that he was influenced by the threatened prosecution, he was not entitled to recover on the ground of duress, since there was no evidence of threatened imprisonment, and for reasons of public policy plaintiff

Digitized by Google

should not be permitted to recover money paid as a part of an illegal and fraudulent transaction wherein plaintiff participated as one of the principals. OSTRANDER and STONE, JJ., dissenting.

Error to Gratiot; Searl, J. Submitted October 9, 1914. (Docket No. 59.) Decided January 3, 1916.

Assumpsit by Peter R. Voorhees against Clinton Nelson and others for the recovery of money paid under duress. Judgment for plaintiff against defendant Nelson, who brings error. Reversed.

Lyon & Moinet, for appellant.

Walbridge & Kelley, for appellee.

In October, 1908, plaintiff was introduced to one Coon by a man named Adams. Adams was an old acquaintance of plaintiff, and a man with whom plaintiff had occasionally played poker. Before the introduction Adams asked plaintiff if he would like to go into something where he could make some easy money. Plaintiff replied that it would depend on what kind of a scheme he had. Adams assured him that it was all straight and that Coon, to whom he then introduced him, would supply the details. Coon thereupon unfolded a plan to the plaintiff, in brief as follows:

He represented that one Guernsey, a cousin of his, was working for a bunch of Pittsburg "millionaires," who were the owners of a fast horse; that they were sports and ready to back their horse for a large sum of money; that Guernsey, their employee, had a horse which would be run against the horse owned by the "millionaires;" and that through a corrupt arrangement with the jockey riding the "millionaires'" horse, the "race" would be thrown against the "millionaires." It was further represented by Coon to the plaintiff that it was necessary for his cousin, Guernsey, to have

Digitized by Google

some one bet the money which Guernsey would furnish against the money which the "millionaires" would wager upon their horse. Coon asked plaintiff to accompany him to Council Bluffs, Iowa, where the "millionaires" then were, and to there bet Guernsey's money against their money, and thus assist in the swindle. Plaintiff at that time was 50 or 55 years of age and had lived in the city of Alma about 13 years, had worked in a sugar factory, had been a contractor, had acted as clerk in two different hotels, and was at that time engaged in the real estate and money loaning business. Defendant Nelson was at that time about 56 years of age, and had lived in Gratiot county 33 years. He was a farmer, bought and sold stock, loaned money, and was a stockholder in both banks in the city of Alma.

Shortly after the first conversation between Coon and plaintiff, plaintiff met defendant Nelson and proposed that Nelson accompany him to Council Bluffs in connection with the proposed "race." He told Nelson that Coon's cousin, Guernsey, had agreed to divide with him (Coon) whatever they won from the "millionaires," and that Coon had agreed to divide his share with the plaintiff, and agreed that if defendant Nelson would go out there with him that if he got any money he would divide with Nelson. Defendant Nelson being influenced by the too common desire for "easy money" readily consented to go, and in turn disclosed the details of the project to one Hooper, another resident of Alma, and asked him to go along to see the "race." Hooper consented and immediately the four —Coon, plaintiff, Voorhees, and defendants Nelson and Hooper—started for Council Bluffs. Arrived in that city, in due course, Coon produced and introduced to the party his "cousin" Guernsey. Guernsey made it plain to the party that the project was a rich one, but asserted that it would be necessary for the man who

Digitized by Google

did the betting to be able to produce some evidences of financial responsibility. Whereupon plaintiff asserted that he was unable to furnish such evidence, but announced that defendant Nelson could do so. It seems to have been suggested by Guernsey that $20,000 should be deposited in a bank in Council Bluffs, not to be used, but as evidence to convince the "millionaires" that real money was to be put up against their cash. At this stage of the proceedings plaintiff and defendant Nelson each wrote a letter to one Brewbaker, cashier of the bank at Alma, for the purpose of arranging a credit there for defendant Nelson so that he could make the necessary showing of financial responsibility in Council Bluffs. Later they concluded that the matter could not be arranged by mail, and defendant Nelson returned to Alma with the intention of arranging it in person. After a conference with the cashier of the bank he returned to Council Bluffs without any money, but further representations having been made to him as to the necessity, he again came to Alma, and upon this occasion took back to Council Bluffs with him a draft for $2,000. This he deposited according to instructions in a bank in Council Bluffs. Although Guernsey expressed dissatisfaction with the smallness of the amount, it was agreed that the match should be made and the "race" proceed. The betting took place in a hotel in Council Bluffs. In one room were defendant Nelson, Hooper, and Coon, and in another room were Guernsey and the "millionaires." At the last moment before the betting started it was suggested by Guernsey that defendant Nelson do the betting instead of plaintiff, Voorhees, because Voorhees was "nervous." The parties agreed to this, and Guernsey turned over to Nelson $5,000 in new currency of $100 denomination.

The *modus operandi* appears to have been as follows: Nelson would bet $1,000, which would be car-

Digitized by Google

ried into the next room and placed in the hands of Guernsey, who, because of his relations to the "millionaires" acted as stakeholder. There this sum was supposed to be covered by an equal amount wagered by the "millionaires." This process would be repeated from time to time. When the $5,000 furnished by Guernsey was exhausted, he found means of returning it to the possession of Nelson, who would thereupon repeat the process. During the first session while this game was being carried on, Nelson theoretically wagered $18,000, and a like amount, the property of the "millionaires," was supposed to be in possession of Guernsey. At this point a recess was taken, when it was hinted to defendant Nelson, Coon, and Hooper that the "millionaires" had remarked upon the fact that their opponents were possessed of so much new money. Somebody thereupon suggested that defendant Nelson withdraw his $2,000 from the bank, which would be paid to him in old bills, that $2,000 of the new money should be exchanged for his $2,000, and that for security this should be placed beneath his nightshirt in his grip, and the old money used in its stead to allay the suspicion of the "millionaires." At the adjourned session this plan was carried out. The betting proceeded as before, but when Guernsey returned the money by messenger to be bet over and over again by Guernsey, it was placed in Nelson's satchel, from which Nelson withdrew it to wager from time to time. The betting finally amounted to the sum of $33,000, when it was discovered by defendant Nelson that the $2,000 supposed to be under his nightshirt had become mixed with the other money, and that he had inadvertently wagered that as well as the money received by him from Guernsey. Defendant Nelson upon making this discovery became convinced that he was being swindled, but was convinced that it would be useless to try to recover his money. The "race"

Digitized by Google

took place the next morning. Through the sudden indisposition of the jockey riding Guernsey's horse, which occurred at a moment when the "race" was almost won, the race was lost, and with it the $2,000 belonging to defendant Nelson. After the "race" was over and on the same day, plaintiff and defendants Nelson and Hooper left Council Bluffs for Alma.

Some time in the year 1909 the Federal authorities in Council Bluffs arrested and prosecuted the Mabray gang, for the perpetration of this among other frauds. Coon appears to have given evidence on behalf of the people in that proceeding. Plaintiff and defendant Nelson were likewise witnesses. In giving his testimony in the criminal case at Council Bluffs, plaintiff denied that he had ever written or seen any letters in connection with the fraud which had been perpetrated. Defendant Smith, the deputy postmaster at Alma, seems to have been active on behalf of the government in producing testimony for the trial at Council Bluffs. It appears that some time after that trial and in March or April, 1910, Coon disclosed to Smith, the alleged fact that plaintiff had been paid a portion of the money out of which defendant Nelson had been swindled at Council Bluffs. Coon, himself, had at that time paid to defendant Nelson about $550. Acting on the information obtained from Coon, Smith interviewed the plaintiff and told him that defendant Nelson believed that he, plaintiff, had participated in the fraud and in the avails thereof. Plaintiff stoutly denied his participation. He testified that Smith threatened if he did not make good Nelson's loss that Nelson would cause his arrest and prosecution in Council Bluffs for his share in the fraud. Smith denied that he made threats of any kind, but admits he told plaintiff that Nelson believed the story related by Coon to the effect that plaintiff had secured part of the money out of

Digitized by Google

which he (Nelson) had been swindled. Several days elapsed between the time this information was conveyed to the plaintiff and April 2, 1910, upon which date plaintiff paid over to defendant Hooper for the use of defendant Nelson the sum of $2,278.50, taking therefor the following receipt:

"ALMA, MICHIGAN, April 2, 1910.

"For a consideration this day received from Peter Voorhees by me, the same being in full of all claims against him in the matter of the Council Bluffs case, and I hereby agree to commence no action against the said Voorhees in any matter growing out of this affair, the same having been fully settled to my satisfaction.

[Signed] "C. NELSON."

On April 22, 1912, 2 years and 20 days after the payment of the money, plaintiff brought his action against the three defendants, Nelson, Hooper, and Smith, charging a conspiracy between the three, and that the money had been paid by him under duress. Upon the trial the court held there was no evidence sufficient to carry to the jury the question of conspiracy, and directed a verdict in favor of defendants Hooper and Smith. He, however, submitted the case to the jury as against defendant Nelson solely upon the question of duress. Under the charge as given the jury returned a verdict in favor of plaintiff for the full sum with interest. The judgment entered thereon is now reviewed in this court by defendant Nelson.

BROOKE, C. J. (*after stating the facts*). As the sole question upon which the case went to the jury was one of duress, it becomes pertinent to examine with some particularity the testimony of plaintiff bearing upon that question. Referring to the defendant, plaintiff testified:

"He did say that in my office when George Sharrar and Mr. Hooper and I were present. He said to me

Digitized by Google

right there, 'Mr. Voorhees, if you are not guilty, I don't want a dollar of your money.'

"*Q.* You believed Mr. Nelson meant that when he told you that there, did you not?

"*A.* Believed he meant what?

"*Q.* Just what he said, that he didn't want a dollar of your money unless you were guilty?

"*A.* Yes, sir; I think so.

"*Q.* You thought so then and you think so now, don't you?

"*A.* Yes, sir; I do.

"*Q.* You thought that Clint Nelson was and is sport enough so that he would not want a dollar back unless you were guilty?

"*A.* I don't think he would. Mr. Nelson made no threat to me of any kind, character, or nature at any time.

"*Q.* The strongest or nearest to any threat that he ever made to you was to say to you, if you are not guilty he didn't want a dollar of your money?

"*A.* Yes, sir."

Plaintiff, further testifying as to what defendant Smith had told him, said:

"Then he said that I would have to fix it up with Mr. Nelson, and if I didn't that somebody was going to prosecute me. * * * And he told me that I had better see Mr. Nelson and get the matter fixed up. Why, they said they were going to take me to Council Bluffs, and prosecute me out there. I didn't know but what they would land me in jail. I could not go there without anybody to go on my bond. I was scared to death. I didn't know but that they would land me in jail.

"*Q.* You expected that you might be taken out there at any minute?

"*A.* Yes, sir. * * * I claim that in my own mind I was perfectly innocent of any charge upon which any prosecution could be grounded. And being entirely conscious of my own innocence, I immediately lost my nerve."

It is quite clear from the foregoing that defendant

Digitized by Google

Nelson himself made no threats of any kind against the plaintiff. On the contrary he repeatedly told plaintiff that if the plaintiff were innocent, that is, if he had not shared in the money out of which defendant Nelson had been swindled, he should not pay a dollar. Assuming (though it is flatly denied by Smith) that Smith made the threats as testified to by plaintiff and that such threats were made by the authority of defendant, of which there is no proof in the record, do they amount in law to duress? We are of opinion that this question must be answered in the negative. In the early case of *Hackley* v. *Headley*, 45 Mich. 569 (8 N. W. 511), Mr. Justice COOLEY, speaking for the court, said:

"Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. It is commonly said to be of either the person or the goods of the party. Duress of the person is either by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted."

In the later case of *Beath* v. *Chapoton*, 115 Mich. 506 (73 N. W. 806, 69 Am. St. Rep. 589), this court, speaking through Mr. Justice GRANT, said:

"Threats of criminal prosecution, unaccompanied by threats of immediate imprisonment, do not constitute duress"—citing *Harmon* v. *Harmon*, 61 Me. 227 (14 Am. Rep. 556); *Buchanan* v. *Sahlein*, 9 Mo. App. 552; *Bodine* v. *Morgan*, 37 N. J. Eq. 426; *Dunham* v. *Griswold*, 100 N. Y. 224 (3 N. E. 76); and *Preston* v. *City of Boston*, 12 Pick. (Mass.) 7, 14.

See, also, *Clement* v. *Mercantile Co.*, 172 Mich. 243 (137 N. W. 657), and *Dallavo* v. *Dallavo*, *ante*, 350 (155 N. W. 538).

Defendant Nelson's eighth request to charge was as follows:

Digitized by Google

"The Supreme Court of this State in *Beath* v. *Chapoton*, 115 Mich. 506, 509 [73 N. W. 806, 69 Am. St. Rep. 589], declares the law to be that 'threats of criminal prosecution unaccompanied by threats of immediate imprisonment, do not constitute duress,' and in accordance with that holding I charge you that there was no duress in this case and that plaintiff cannot recover against any of the defendants."

We are of opinion that this request should have been given. It is worthy of note that plaintiff, upon the payment of the money for which he brought suit, secured from defendant the receipt which is set out in the statement of facts, and that he permitted the matter to stand without disaffirming the contract or making any demand for the return of his money for more than two years. In the meantime the Federal statute of limitations (U. S. Comp. Stat. 1901, § 1044), had run in his favor so that a prosecution against him for complicity in the fraud perpetrated at Council Bluffs was barred. He testified that he held this receipt as a protection against such prosecution.

Although plaintiff is barred from recovery in this case because the payment of the money was not secured by the exercise of legal duress, we think a broader ground exists for reaching the same conclusion. The payment of the money was corollary to, if not a distinct part of, the illegal and fraudulent transaction in which plaintiff frankly admits he participated as a principal. Whether his original purpose was to help swindle his friend, defendant Nelson, or simply to help Nelson and Guernsey to swindle the "millionaires," or whether he actually participated in a division of defendant Nelson's money, appears to be of no consequence. Public policy demands that the courts be closed to men such as the plaintiff when they come demanding relief from consequences which result from their own admittedly illegal and fraudulent acts.

Digitized by Google

The judgment is reversed, and there will be no new trial.

MOORE and STEERE, JJ., concurred with BROOKE, J.

KUHN, J. I concur in the result reached by Justice BROOKE, as to the question of duress.

OSTRANDER, J. (*dissenting*). The trial court advised the jury:

"You will readily see it all gets down to the question of whether Voorhees at the time he paid this money over was acting as a free moral agent. Did he have his will power and exercise it there? It is not sufficient for him to show to you that the threats were made; that alone is not enough. It is not enough for him to show that the threats were made and that he had some fear of arrest or some fears that the government would take some proceedings against him or investigate further. That is not sufficient. But in order to recover here, he must show to you that these threats that were made in behalf of Nelson, if they were made in behalf of him as the plaintiff claims, had such an influence upon him and over him and upon his mind as to so put him in fear of the results of what might happen if he didn't pay, as to take away his will power and impelled him to pay any way, against his wishes.

"In considering whether he was so under duress and so in fear and compelled to pay, considering whether he did act as a free moral agent or not, you should consider all that had come to the knowledge of Voorhees. You will remember that there was some testimony of Sharrar having been told by Smith, if I remember correctly, something about this transaction, and that Sharrar testifies that he communicated that to Voorhees. You have a right to consider that, if you find it to be true, even though that didn't come directly from Nelson, as determining the condition of Mr. Voorhees' mind. How much was he worked up about the matter? And I think it is practically conceded by everybody that he was somewhat excited. The question is what was his condition of mind. How much was he put in fear, to what extent, at the time the

Digitized by Google

transaction was finally closed up? If it was to the extent that he could not resist, his will power was overcome by reason of the fear, then the money was involuntarily paid and he may recover it back. Otherwise he cannot do so."

This, I think, is a fair statement of the applicable law. *Lewis* v. *Doyle*, 182 Mich. 141 (148 N. W. 407); *Nelson* v. *Leszczynski-Clark Co.*, 177 Mich. 517 (143 N. W. 606); *Clement* v. *Mercantile Co.*, 172 Mich. 243 (137 N. W. 657); *Cribbs* v. *Sowle*, 87 Mich. 340 (49 N. W. 587, 24 Am. St. Rep. 166); *Koons* v. *Vauconsant*, 129 Mich. 260 (88 N. W. 630, 95 Am. St. Rep. 438). There was, in my opinion, abundant testimony to sustain a verdict for plaintiff under the charge of the court.

It is clear, and the jury was advised, that defendant Nelson had no claim against plaintiff which he could have enforced. Plaintiff denies that he ever had any of the money which Nelson lost at Council Bluffs. But Nelson demanded and received from plaintiff $2,278.50, and he signed the receipt and promise set out in the opinion of Mr. Justice BROOKE. As computed by Nelson, this is the sum of all the money he lost at Council Bluffs, interest upon it, and his expenses. How did Nelson contrive to secure this money? The testimony for plaintiff, if believed, proves beyond question that it was secured by means calculated most certainly to work upon the mind of plaintiff, to induce fear, to cause him at any sacrifice to save himself from represented, threatened, danger, not necessarily of conviction for a crime committed, but of arrest, examination, and perhaps trial for an alleged offense. It is true that Nelson made no threats and said to plaintiff that if he had none of his, Nelson's, money he did not want a dollar. But of what avail was this when by his actions and those of his agents he was also saying,

Digitized by Google

"I do not believe your denials, I believe you guilty and I want the money."

Smith himself testifies that he had an arrangement with Nelson by the terms of which he was to receive one-half of whatever sum Nelson recovered or received. He has since begun suit against Nelson to recover it. Hooper, also active in the matter, was paid more than $500 by Nelson for his good offices. Very adroitly, the danger in which he stood was represented to plaintiff and to his partner. Plaintiff was not beaten into insensibility with a club, nor confronted with handcuffs or a warrant for his arrest. Probably defendant Nelson and his agents would say that plaintiff's conscience was made particularly active. A fair interpretation of the testimony is that the psychological effect of the suggestions adroitly made to plaintiff was the effect hoped for, producing what Nelson and his agents profited by.

Nor do I agree with the conclusion that the courts are closed to plaintiff even if the money was procured by duress. His demand in this suit is not from consequences of his own illegal or fraudulent acts. It is for money secured from him by intimidation and coercion. Men "such as the plaintiff" are not without redress against those who, using their knowledge of some escapade, succeed in extorting money from them. If this were not so, then reprisals might go on for an indefinite period with safety to the one who best succeeded in creating terror.

Properly enough, in the view he has taken, my Brother BROOKE does not state or discuss numerous points raised by appellant. There are 62 assignments of error. Many of them are answered when it is determined that there was, or was not, a question of fact for the jury. Others are based upon the notion that because plaintiff preserved the receipt given to him

Digitized by Google

by Nelson, when he paid Nelson the money, and claimed in his testimony to have relied upon that and other papers for any protection they might afford him, from criminal prosecution among other things, that the court ought to have charged the jury as follows:

"11. If plaintiff's understanding when he paid the money in question was that he had done something in connection with the Council Bluffs transaction that would or might be investigated by the criminal authorities or that he would or might be prosecuted thereon, and he paid the money, gave the note and took the receipt for his protection against such course, then he cannot recover."

I find no testimony tending to prove that plaintiff paid the money to compound a felony. Undoubtedly, his testimony supports the conclusion that he believed that by paying the money an investigation of his conduct (and Nelson's) at Council Bluffs might be, or would be, prevented. No such prosecution was even threatened. It was the imagination of plaintiff, stimulated by the statements and actions, principally of Smith and Hooper, and the demand of Nelson, which pictured the possible fate of himself, innocent or guilty, if what was represented as probable became actual. Believing the testimony of and for plaintiff, no one can reasonably conclude that he voluntarily paid the money to Nelson.

Some reliance is placed by appellant upon the fact that a considerable length of time elapsed between the payment of the money and the bringing of this action, during which the Federal statute of limitations operated in plaintiff's favor. The fact is material as affecting the estimate the jury should give to plaintiff's testimony in determining whether he paid the money under duress. But if the money was paid by duress, there is no statute of limitations which may be successfully pleaded by defendant.

Digitized by Google

Error is assigned upon rulings admitting and rejecting testimony. Conspiracy of defendants is alleged in the declaration, and considerable latitude was properly allowed in receiving testimony which it was claimed tended to prove, or disprove, concerted action. Whether the court was right in holding there was not sufficient testimony upon the subject of conspiracy to take the case to the jury is a question not presented upon this appeal. An examination of the exceptions relied upon has satisfied me that no prejudice could have resulted to appellant.

Satisfied there was no reversible error committed, I think the judgment should be affirmed.

STONE, C. J., concurred with OSTRANDER, J.

BIRD, J., did not sit.

The late Justice MCALVAY, to whom this case was assigned, took no part in this decision.

UNION BANKING CO. *v.* TRUSCOTT BOAT MANUFACTURING CO.

1. EQUITY—JURISDICTION—BILL IN AID OF EXECUTION — DEBTOR AND CREDITOR—DEMURRER.

A bill in aid of execution lies in the courts of this State to avoid fraudulent transfers made by a bankrupt corporation, the affairs of which are in process of administration in the Federal courts of a foreign State. In cases where the bankruptcy court has jurisdiction the State court has concurrent jurisdiction with it. And the possession of the bankruptcy court determines whether it has jurisdiction. OSTRANDER, J., dissenting.

Digitized by Google

2. SAME.

Held, on demurrer, that objections raised to the pleading as stating a conclusion and to the question of good faith of subsequent creditors were not necessary to be considered, and that if the averments of the complainant were established at the hearing it would be entitled to relief in some form.

Appeal from Berrien; Bridgman, J. Submitted January 14, 1915. (Docket No. 87.) Decided January 3, 1916.

Bill in aid of execution by the Union Banking Company against the Truscott Boat Manufacturing Company and others. From a decree overruling a demurrer to the bill, defendants appeal. Affirmed.

Stratton & Evans, for complainant.

Montgomery, Hart, Smith & Steere, for defendant Mann.

BIRD, J. This bill in aid of execution is filed by complainant, as a judgment creditor of the Truscott Boat Manufacturing Company, to set aside a conveyance of certain premises situate in the city of St. Joseph, made by it to the National Boat & Engine Company, on the theory that it was in fraud of its creditors. Defendant Mann demurred to the bill, and upon a hearing thereof the demurrer was overruled.

The bill alleges that complainant on December 20, 1910, recovered a judgment for damages and costs in the St. Joseph circuit court against the Truscott Company in the sum of $10,163.58, and that thereafter execution was duly issued out of said court and levied upon said premises. Then follows the usual allegations in such a bill. In addition to them, it is alleged that the Truscott Boat Manufacturing Company in December, 1910, was engaged in manufacturing motor-

Digitized by Google

boats in the city of St. Joseph; that it was then a going and solvent concern, and was the owner of real and personal property amounting to the sum of $100,000, and that its indebtedness did not exceed $25,000; that, while its financial affairs were in this condition, it was induced to and did enter a merger of boat companies to be called the National Boat & Engine Company, a Maine corporation. The consideration therefor was preferred and common stock of the National Boat & Engine Company in the amount of $542,170, and first mortgage bonds of that company in the sum of $42,000. These stocks and bonds were turned over to and accepted by the stockholders of the Truscott Company in consideration of a conveyance of all of its corporate property. After said transfers of the Truscott Company, and the transfers of the other companies constituting said merger, the said National Boat & Engine Company executed a trust deed upon the entire assets conveyed to them to the Astor Trust Company to secure an issue of bonds of $3,000,000. Subsequently William H. Mann was substituted as trustee in place of the Astor Trust Company.

It is further represented that the said National Boat & Engine Company was declared bankrupt in the District Court of the United States for the District of Maine on or about the 15th day of September, 1911, and that such proceedings were thereafter had that one Walter I. Woodman was appointed trustee in bankruptcy of the estate of said bankrupt, and that the said Walter I. Woodman claims to be in possession of the real estate, the buildings, and manufacturing plant of the said Truscott Company in said city of St. Joseph. It is further charged that the Truscott Boat Manufacturing Company in and by said transfers divested itself of all of its property, and on information and belief it is charged that the National Boat & Engine Company was a corporation without capital, and that

Digitized by Google

it paid no consideration for said conveyances from the said Truscott Company, and that said transfers are fraudulent and void, and were made for the purpose of defrauding the complainant and the other creditors of the said Truscott Company, and delaying the collection of their judgments. And the following relief is prayed for:

(*a*) "That the warranty deed whereby said premises were conveyed to the National Boat & Engine Company may be decreed to be null and void."

(*b*) "That said trust deed to the Astor Trust Company as trustee be decreed null and void so far as the premises in question are concerned."

(*c*) "That said Walter I. Woodman, trustee in bankruptcy, be decreed to have no interest whatever in the premises described in paragraph 2 of this bill of complaint, as trustee in bankruptcy of the National Boat & Engine Company, and that said Walter I. Woodman be enjoined from asserting any rights of possession or ownership over said premises, and especially the said Walter I. Woodman, as trustee, be enjoined by the final decree of this court from selling, mortgaging, or offering for sale the said premises, and from in any manner interfering with the sale of said premises pursuant to the final decree of this court."

(*d*) "That said William H. Mann, as successor in trust to the Astor Trust Company, be enjoined from asserting any right or control over said premises by virtue of said trust deed, and the said William H. Mann, as such trustee, be enjoined from the foreclosure of said trust deed, or taking any action whatever thereunder in any manner interfering with the sale of said property and conveyance to the purchaser under sale of a title free and clear of any claim or lien which said William H. Mann, as trustee, but for the said decree, might assert under said trust deed against said premises."

(*e*) "That said property described in the bill of complaint be decreed to be the property in fee simple of the Truscott Boat & Engine Company, free and clear from any claims of the National Boat & Engine Company, or of Walter I. Woodman, its trustee in bank-

Digitized by Google

ruptcy, and free and clear of any claims or liens of William H. Mann, as successor in trust to the Astor Trust Company, under said trust deed."

With a further prayer for general relief.

The grounds of demurrer are:

"(1) That the allegation in the sixteenth paragraph of said bill of complaint that the trust deed dated October 1, 1910, from the National Boat & Engine Company to the Astor Trust Company, is fraudulent and void, and constitutes a cloud upon the title of the premises in said bill of complaint described, is a mere conclusion of law, and that the said bill of complaint contains no allegations of fact upon which the complainant is entitled to any relief as against this defendant.

"(2) The said complainant in the twelfth paragraph of its said bill of complaint alleges that $42,000 of the bonds of the National Boat & Engine Company, which were delivered to the stockholders of the Truscott Boat Manufacturing Company, were secured by the said mortgage to the Astor Trust Company under which this defendant is trustee as the successor of the said Astor Trust Company.

"(3) It does not appear from the said bill of complaint that this defendant, or his predecessor in said trust, had any notice of the claims of the complainant in said bill of complaint set forth prior to the delivery of the said Astor Trust Company mortgage, or prior to its recording, or prior to the issuance and sale of the bonds thereby secured.

"(4) It does not appear from the said bill of complaint that the bondholders, who have paid value for their bonds secured by the said trust deed to the Astor Trust Company under which this defendant is successor in trust, had any notice of the claims of the said complainant prior to the purchase by the said bondholders of their said bonds.

"(5) It does not appear from the said bill of complaint that the rights of the beneficiaries of the said Astor Trust Company mortgage, under which this defendant is successor in trust, are inferior to the rights claimed by the complainant in this cause.

"(6) The said complainant does not in and by its said bill of complaint offer to redeem the property on

Digitized by Google

which it claims a lien, and in which it can obtain its rights only by first paying the indebtedness secured by the deed of trust of the National Boat & Engine Company to the Astor Trust Company, under which this defendant is successor in trust.

"(7) It appears from the said bill of complaint that this court has no jurisdiction of the subject-matter of the said bill of complaint, but that the jurisdiction of said subject-matter is with the District Court of the United States in and for the District of Maine."

1. It is asserted in support of the demurrer on the question of jurisdiction that the court in which this proceeding was launched, it being a State court, had no jurisdiction to determine the title of the property in question, because the entire assets, including these premises, are in the possession and under the control of the bankruptcy court, and therefore are in the custody of the law. While counsel for the demurrer does not assert in so many words that, where the *res* is in the custody of the law, the case must be tried in the bankruptcy court, still his argument implies that. Counsel for complainant concedes that, where the bankruptcy court has possession of the *res*, it has jurisdiction to determine the question of title between the trustee in bankruptcy and an adverse claimant, but he also insists that, while this is true, the State court has concurrent jurisdiction to determine the same thing. We think the cases of *Bardes* v. *Bank*, 178 U. S. 524 (20 Sup. Ct. 1000), and *Whitney* v. *Wenman*, 198 U. S. 539 (25 Sup. Ct. 778), settle the controversy in favor of the contention of the complainant. In the *Bardes Case* the bankruptcy court did not have the custody of the property, which was the subject-matter of the suit, and the court held that the bankruptcy court did not have jurisdiction to entertain the action. In the *Whitney Case* the court by construction held that the property was in the possession of the bankruptcy court, and therefore held that the question of the title

Digitized by Google

to the property could be adjudicated by that court. Both opinions make it clear that the controversies might have been settled in the State court.

The same question arose in a case in the State of New York, where a creditor sought to enforce his chattel mortgage lien against property in the possession of the bankruptcy court. It was held by the Court of Appeals that the State courts had jurisdiction thereof. *Skilton* v. *Codington*, 185 N. Y. 80 (77 N. E. 790, 113 Am. St. Rep. 885). In the course of that opinion it is said (quoting from *Eyster* v. *Gaff*, 91 U. S. 521):

"'The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared a bankrupt the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance, and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and dispose of their rights in a summary way. This court has steadily set its fact against this view. The debtor of a bankrupt or the man who contests the right to real or personal property with him loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions.'

"This statement is quoted with approval by Judge Gray in *Bardes* v. *Bank*, *supra*. Of course, we do not mean to assert that under the judgment of the State court the fund or property could be taken from the possession of the bankruptcy court; the contrary is the law."

The jurisdiction of the bankruptcy court appears to turn upon the question whether or not it has the possession of the fund or property over which the controversy arises. If it has such possession, jurisdiction

Digitized by Google

follows. If it does not have possession, it is without jurisdiction. In cases of this character, where the bankruptcy court has no jurisdiction, the State court has jurisdiction. In cases where the bankruptcy court has jurisdiction, the State court has concurrent jurisdiction with it.

2. As to the other causes of demurrer aside from the one of jurisdiction, the chancellor, in passing upon it, observed that:

"It seems unnecessary to consider assignments number 1 to 6, inclusive. Such claims may or may not warrant a denial of the bill on final hearing after the evidence is all in."

After considering these causes of demurrer, we are led to the same conclusion. Should complainant establish the allegations of his bill to the satisfaction of the chancellor at the hearing, it will be entitled to some relief.

The order overruling the demurrer is affirmed.

STONE, C. J., and KUHN, MOORE, STEERE, and BROOKE, JJ., concurred with BIRD, J.

OSTRANDER, J. I think the court is without jurisdiction.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

Digitized by Google

INDEX.

ABATEMENT—See MANDAMUS (8).

ABSENCE FROM STATE—See LIMITATION OF ACTIONS (1).

ABSOLUTE SEPARATION—See DIVORCE (2).

ACCOMMODATION INDORSER—See EVIDENCE (3).

ACCORD AND SATISFACTION—See COMPROMISE AND SETTLEMENT (1).

ACKNOWLEDGMENT—See DEEDS (2).

ACQUIESCENCE—See BOUNDARIES (1).

ACREAGE—See TAXATION (1).

ACTION—See APPEAL AND ERROR (6); ESTATES OF DECEDENTS (4); MUNICIPAL CORPORATIONS (6); PARTNERSHIP (1).

ACTIONS, LIMITATION OF—See LIMITATION OF ACTIONS.

ADEQUATE REMEDY AT LAW—See MANDAMUS (6, 8).

ADJACENT LANDOWNERS—See WATERS AND WATERCOURSES (2).

ADMISSIONS—See FRAUDULENT CONVEYANCES (1).

ADVANCES—See SALES (1).

ADVERSE POSSESSION.

1. If one of several cotenants, in the occupancy of lands, purposes to acquire title by hostile tenure, as against his cotenants, the proof of his denial of their right should be clear and unambiguous and must be brought home to their knowledge by express notice or by implication: the case may not be made out by inference. *Donohue* v. *Vosper*, 80.

2. The possession of one of two tenants in common is of right and does not import adverse possession, and the presumption arising from such occupation must be overcome by conduct inconsistent with the recognition of existing rights in other tenants in common. *Id*

Digitized by Google

ADVERSE POSSESSION—Continued.

3. By executing with the several cotenants an option, and thereafter, a mining lease of the holding in common, the tenant in possession recognized their rights and stopped the running of the statute as against them. *Id.*

4. Defendants' adverse possession during a long period of time of a portion of the sidewalk in a city for a cellarway, created no rights to a different portion of the street which it later attempted to occupy with a new stairway in a building that subsequently replaced the original one. *City of Ann Arbor* v. *Real Estate Co.*, 165.

5. Act No. 46, Pub. Acts 1907, providing that no rights as against the public shall be acquired by reason of the occupancy or use of any public highway, street, etc., in any township, village, or city of the State, whether such occupation or use be adverse or not, and the charter of said municipality enacted in 1867 containing similar provisions, prevented defendant from obtaining prescriptive rights after 1867, and, prior to that date, the evidence failed to show hostile use for a sufficiently long period of time. *Id.*

6. In view of a city ordinance vesting in the board of public works authority to issue permits to occupy any portion of the street, defendant could not claim the right to possession of part of the street, by virtue of a permit that its predecessor in title secured from the city council to construct a cellarway, especially when he never acted upon it and did not convey his rights to the defendant, and the board of public works took no action in relation thereto. *Id.* 166.

See BOUNDARIES (2, 3).

AFFIRMATIVE PROOF—See EVIDENCE (11).

AFTER ACQUIRED TITLE—See DEEDS (1).

AGENCY—See PRINCIPAL AND AGENT.

AGENT'S AUTHORITY—See PRINCIPAL AND AGENT (1, 2).

ALIMONY—See DIVORCE (2, 6).

ALLEY—See EJECTMENT.

AMENDMENTS—See PLEADING (1-3); PRACTICE (1, 5).

ANIMALS—See RAILROADS (2, 3); SALES (4).

ANN ARBOR CHARTER—See ADVERSE POSSESSION (5).

APPEAL AND ERROR.

1. The bill of exceptions in a proceeding to review, in the Supreme Court, by writ of error, the denial of a motion for a new trial, under 3 Comp. Laws, § 10504, should contain all proceedings upon such motion, including the

Digitized by Google

APPEAL AND ERROR—Continued.

reasons given by the trial court and exceptions taken to the refusal, and failure to do so precluded the review of the finding of the court, although counsel incorporated such exceptions in the printed record. *In re Keene's Estate*, 98.

2. In determining whether or not the trial court erred in directing a verdict against plaintiff, who was injured by falling into an excavation in accumulated snow and ice, in the streets of a city, the evidence must be considered in that light which is most favorable to the claim of the plaintiff. *Morrison* v. *City of Ironwood*, 117.

3. While a decision by an equally divided court may not be conclusive in other subsequent causes, having different parties, it operates as a rule of law binding upon the same litigants in a later appeal; hence, after such opinion sustaining the trial court which overruled a demurrer to plaintiff's declaration, the Supreme Court will treat the parties as concluded by the determination in the former appellate proceedings upon a review of the evidence offered in support of plaintiff's averments. *Gourlay* v. *Insurance Co.*, 384.

4. A cause that presents only a moot point, relating to merely abstract questions of law, will not be passed upon by the Supreme Court; hence, on certiorari to review mandamus proceedings in which the court denied the writ of mandamus to compel village officials to approve relator's liquor bond, this court will not decide the point after expiration of the period covered by the license. *Carlson* v. *Wyman*, 402.

5. On error to review a judgment at law, the appellant is not entitled to reverse the judgment for failure to charge the jury, if no requests for instructions were filed. *Hydrex Silent Exhaust Works* v. *Engine Works*, 431.

6. The seller of specially manufactured articles that have been refused by the purchaser has the remedy of retaining the property in the event of their destruction and suing for the entire purchase price, or he may sell the goods and apply the proceeds on account, or keep them and bring an action for the loss sustained. *Id.*

7. Upon certiorari to review an award of the Industrial Accident Board, its findings of fact, in the absence of fraud, are conclusive. *Papinaw* v. *Railway Co.*, 441.

8. In the absence of exceptions, improper argument of plaintiff's counsel is not reviewable on writ of error. *Feist* v. *Root*, 596.

9. The Supreme Court will not, in civil causes, consider assignments of error based upon the failure of the court to give instructions for which no requests were filed. *Minds* v. *Keyes*, 629.

Digitized by Google

APPEAL AND ERROR—Continued.

10. The action of the trial court in declining to grant a motion for a new trial, indicating no abuse of discretion, will not be reviewed by this court on writ of error. *Id.*

See DAMAGES (8); DRAINS (4); EVIDENCE (1, 9); JUDGMENT (3); MANDAMUS (6, 7); TRIAL (1, 2); WATERS AND WATERCOURSES (1).

APPLICATION—See INSURANCE (3).

APPROVAL OF PROBATE JUDGE—See MORTGAGES (4).

AREAWAY—See ADVERSE POSSESSION (4).

ARGUMENT OF COUNSEL—See APPEAL AND ERROR (8); TRIAL (1).

ARRESTING OPERATION OF STATUTE—See ADVERSE POSSESSION (3).

ASSAULT AND BATTERY—See EVIDENCE (1, 2); MASTER AND SERVANT (14, 20); TRESPASS VI ET ARMIS (1, 2).

ASSESSMENTS—See DRAINS (1); TAXATION (4, 8).

ASSIGNMENTS—See ADVERSE POSSESSION (6); JUDGMENT (3); MORTGAGES (1, 4).

ASSUMPSIT—See MUNICIPAL CORPORATIONS (3, 6).

ASSUMPTION OF RISK—See MASTER AND SERVANT (1).

ATTORNEY AND CLIENT—See JUDGMENT (4); PARTNERSHIP (1, 3).

AUTHORITY TO EJECT—See MASTER AND SERVANT (16).

AUTOMOBILES.

1. In an action for injuries sustained in a collision with defendant's automobile, language of the trial court, in the charge to the jury, that plaintiff was "bound to use every reasonable means to avoid a collision," read in connection with other instructions, *held*, cured or modified so as to avoid prejudice. *Jordan* v. *Wixson*, 288.

2. *Held*, that the testimony warranted a verdict and judgment for the defendant on the theory of contributory negligence. *Id.*

See EVIDENCE (9, 10); INTOXICATING LIQUORS (1); STREET RAILWAYS (2).

BAILMENT—See CONTRACTS (1).

BALLOT BOXES—See MANDAMUS (2, 3).

BANKRUPTCY—See EQUITY (7).

BAR—See LIMITATION OF ACTIONS (6).

Digitized by Google

BENEFICIAL ASSOCIATIONS—See INSURANCE (3).

BILL IN AID OF EXECUTION—See EQUITY (3, 5, 7).

BILL OF EXCEPTIONS—See APPEAL AND ERROR (1).

BILLS AND NOTES.

1. In an action on a promissory note, given for a motor truck which proved defective, the plaintiff, who was president of the payee, and who took the notes as payment upon advances that he had made to the corporation, was entitled to a directed verdict, as a holder in due course, upon uncontradicted evidence showing that plaintiff caused them to be sent to his brother-in-law, the secretary of the company, for collection; that the latter acted in plaintiff's behalf and was not acting for the corporation, though plaintiff testified that the said secretary had told him that the notes were at the factory and had mentioned his official connection with the payee. *Poss* v. *Meader*, 323.

2. Any notice that may have come to plaintiff of the existence of a contract between the payee and maker of the note was insufficient to charge him with notice of breach of the contract of warranty. And the fact that he was president of the corporation does not affect the application of the rule. *Id.* 324.

3. It was error to admit in evidence statements claimed to have been made by the corporate secretary to defendant relating to the time when plaintiff purchased the notes, to charge him with notice of alleged defects. *Id.*

4. A promissory note negotiated, dated, signed, indorsed and delivered in Ontario, where it was also made payable and where all the parties resided, was a foreign contract, and though the right of action was transitory, the contractual rights of the parties were governed by the law of the place of contract. *Millar* v. *Hilton*, 636.

5. Under the law of the place of execution the payor's wife was liable on her indorsement with the same force and effect as though she was unmarried and proof of her signature, in the absence of evidence of duress or undue influence, made out a *prima facie* case. No presumption arose from the fact of coverture that shifted the burden of proof to plaintiff. *Id.*

See ESTATES OF DECEDENTS (2); EVIDENCE (3); LIMITATION OF ACTIONS (4, 5); RELEASE (2).

BOARD OF REVIEW—See TAXATION (5).

BOARDS OF SUPERVISORS—See MANDAMUS (3).

BONA FIDE HOLDER—See BILLS AND NOTES (1).

BOUNDARIES.

1. A fence which plaintiff's lessor, a railroad corporation,

Digitized by Google

BOUNDARIES—Continued.

erected in 1871, as it supposed, upon the line of its property, and which the adjoining proprietor assumed to be on the line, until about 1913, did not become the boundary line by acquiescence and agreement; not being located correctly. *Lake Shore, etc., R. Co.* v. *Sterling*, 366.

2. In order to bind the interested proprietors it is necessary that the parties make an honest attempt to fix the true boundary and agree upon a line orally or otherwise according to which they afterwards occupy the premises. *Id.*

3. Without a privity between the successive owners in possession, the several possessions cannot be tacked together so as to create continuity. Hence, a proprietor who entered on his property under a deed of conveyance which excluded by description the land in dispute, could not maintain his claim thereto by adverse holding based upon his own possession and that of his predecessors in title. *Id.*

See EJECTMENT.

BREACH OF CONDITIONS—See INSURANCE (1).

BREACH OF CONTRACT—See COMPROMISE AND SETTLEMENT (7); CONTRACTS (4); DAMAGES (5-7); PLEADING (3); PRINCIPAL AND AGENT (3).

BREACH OF WARRANTY—See SALES (5).

BROKERS.

1. Plaintiff, who was engaged in the business of real estate brokerage, interviewed defendant as to the sale of a certain terrace owned by defendant, who fixed a price of $18,000. Plaintiff stated that he would expect a commission. Defendant asked how much and the reply was three per cent. Defendant said he thought two per cent. was sufficient on so large a transaction. No writing was made. The plaintiff introduced one of his customers to defendant, who declined an offer of $15,000 for the realty, saying that $17,000 was the least he would accept. Defendant claimed that he only agreed to pay the commission if plaintiff secured a price of $18,000 for the property. Over a year later defendant sold the terrace to the said purchaser at $17,000. In defense of an action for the commissions for making the sale, it was urged that the contract had terminated by lapse of time. *Held*, that the conflicting testimony with regard to the terms of the oral contract presented a question of fact and whether or not the plaintiff was the procuring cause of the sale was for the jury. *Lerner* v. *Harvey*, 249.

2. The fact that the owner finally sold the property at a price $1,000 less than the agreement called for was not conclusive of defendant's right to a verdict, upon testimony of the plaintiff that he had general authority to secure a customer ready and willing to purchase the property and that

Digitized by Google

BROKERS—Continued.

defendant fixed the price at $18,000, later reducing it to $17,500 and, finally, to $17,000; if the jury believed plaintiff's version their verdict was warranted. *Id.* 250.

3. In a broker's action for commissions on the sale of real property, disputed claims of plaintiff as to an agreement between him and defendant, another broker, to divide commissions, *held*, to present a question of fact for the jury. *Minds* v. *Keyes*, 629.

BUILDING AND LOAN ASSOCIATION—See CORPORATIONS (1).

BURDEN OF PROOF—See BILLS AND NOTES (5); COMPROMISE AND SETTLEMENT (2); INSURANCE (2); LANDLORD AND TENANT (3); MASTER AND SERVANT (11); QUIETING TITLE (1, 4); TAXATION (10).

BUSINESS OR PROFESSION—See PARTNERSHIP (2).

CANCELLATION OF INSTRUMENTS.

1. In a suit to cancel certain conveyances and deeds between complainant and his wife in settlement of their marital affairs, and to induce defendant to consent to let a decree of divorce stand between the parties which she claimed had been procured by his fraudulent representations concerning her place of residence, evidence of a conflicting nature considered, and *held*, to warrant the conclusion of the trial court that the complainant failed to establish his claim of duress under threats of prosecution. *Dallavo* v. *Dallavo*, 350.

2. The fact that complainant weighed in his mind what consequences might result from his failure to enter into a settlement, unless actual threats of prosecution were made by the wife, did not establish that he was so bereft of the quality of mind and power of will essential to entering into contracts as to be incapacitated to exercise freedom of will power. *Id.* 351.

3. That complainant was not innocent of wrong doing was not a ground for denying to him equitable relief under the maxim that he who comes into a court of equity must come with clean hands. *Id.*

4. The fact that the wife agreed in the contract to care for and support the minor children of complainant was sufficient consideration to support the agreement. *Id.*

5. But *held*, that the dower interest of complainant's second wife should be preserved and the court of equity should retain jurisdiction for that purpose and an order dismissing the bill of complaint is reversed. *Id.*

See CORPORATIONS (1); FRAUDULENT CONVEYANCES (1).

CARRIERS.

A passenger who, on hearing the brakeman call a station, and seeing him open the vestibule door, left his seat and

Digitized by Google

CARRIERS—Continued.

went to the platform, believing from the jar of the train that it had stopped, and attempted to alight from the steps of the moving car, in the darkness, was guilty of contributory negligence, and the receivers of the road were not chargeable with negligence for announcing the station before the train arrived there, or had stopped. *Hooker* v. *Blair*, 278.

See DAMAGES (1); NEGLIGENCE (4, 6).

CATTLE GUARDS—See RAILROADS (3).

CERTIORARI—See APPEAL AND ERROR (4, 7); DRAINS (4).

CHANGE OF PARTIES—See CONTRACTS (2).

CHECKS—See COMPROMISE AND SETTLEMENT (1).

CHURCH PROPERTY—See TAXATION (6).

CIRCUIT COURT COMMISSIONER—See COSTS (2); PRACTICE (6).

CITIES—See ADVERSE POSSESSION (5, 6); MUNICIPAL CORPORATIONS (7); TAXATION (4).

CIVIL-DAMAGE ACTION—See INTOXICATING LIQUORS (1).

CLEAN HANDS—See CANCELLATION OF INSTRUMENTS (3).

CLERK OF BOARD OF REVIEW—See TAXATION (2).

COLLATERAL ISSUE—See COMPROMISE AND SETTLEMENT (7).

COMMISSIONS—See BROKERS.

COMPENSATION—See BROKERS (1); MASTER AND SERVANT (13).

COMPENSATION FOR PARTIAL LOSS OF EYE—See MASTER AND SERVANT (19).

COMPETENCY—See INSANE PERSONS.

COMPROMISE AND SETTLEMENT.

1. Acceptance by plaintiffs of a check sent by defendants in full settlement of a purchase of logs, bearing on its back the statement that it was in full settlement of the timber that had been received and if not correct, to return check, indorsment meant receipt in full, barred any action for an alleged balance on account, the amount of indebtedness having been in dispute, and operated as a compromise of the items in controversy, although plaintiffs replied to defendants' letter accompanying the check that they had applied the remittance on account, and claimed a balance unpaid of $1,207.24. *Hoey* v. *Ross*, 193.

2. Under testimony of an undisputed character, that defendants sent the check indorsed as above and that plaintiffs ac-

Digitized by Google

COMPROMISE AND SETTLEMENT—Continued.

cepted their proposition by cashing it, there was no question for the jury; the evidence satisfied the burden of proof resting on the defendants and the issue was one of law. *Id.*

3. Plaintiff, who supplied defendant's ice house with ice, was not entitled to a directed verdict in his favor where he and defendant settled a dispute with regard to the manner in which he had packed the ice, by agreeing that defendant should pay a substantial part of the price agreed upon before March 24th and the balance on May 15th, if the ice was in good condition at the date named, and where the evidence was in conflict whether the ice was in good or in poor condition at the stipulated time, the issue raised was for the jury. *Stevens* v. *Utilities Co.*, 203.

4. Evidence to show the value of the work done was therefore immaterial; if the ice was in fact in good condition at the date agreed upon, plaintiff should have been permitted to recover the deferred payment; if not, defendant was entitled to a verdict. *Id.*

5. The trial court erred in excluding evidence relative to the condition of the ice at the time fixed by plaintiff and defendant according to the later contract; and it was also erroneous to advise the jury that plaintiff might, although they found he was in default, recover a part of the deferred payment. *Id.*

6. There was reversible error at the trial in charging the jury that the settlement between the parties provided for a forfeiture and that the law abhors a forfeiture. *Id.*

7. Where plaintiff agreed to furnish silencers to be fitted to engines which defendant manufactured for a corporation that had common stockholders and officers with the plaintiff, and defendant claimed, in an action for breach of its agreement to receive the silencers, that plaintiff had compromised its claim with the purchaser of the engines, the court did not err in rejecting evidence of the alleged settlement, since it would tend to raise a collateral issue. *Hydrex Silent Exhaust Works* v. *Engine Works*, 431.

CONCLUSION—See EVIDENCE (2).

CONDITIONAL PAYMENT—See COMPROMISE AND SETTLEMENT (1).

CONDUCT OF COUNSEL—See SALES (3).

CONFLICT OF LAWS—See CONTRACTS (5); EQUITY (7).

CONSIDERATION—See CANCELLATION OF INSTRUMENTS (4); INSURANCE (2); JUDGMENT (2); SALES (12).

CONSTITUTIONAL LAW.

Under the constitutional prohibition against increasing salaries of public officers after election or appointment, in-

Digitized by Google

CONSTITUTIONAL LAW—Continued.

terpreted in the light of the Constitution of 1850 and the debates in the constitutional convention, which indicate the intention to re-enact a clause contained in the former Constitution without substantial modification, the salaries of the State tax commissioners could not be increased during the term of office for which they were elected, and the provision could not be evaded by their resigning and securing a new appointment to the commission during the period for which the appointments were originally made. The office of tax commissioner has a fixed term of six years, to which this constitutional measure was intended to be applicable. *Kearney* v. *Board of State Auditors*, 666.

See PLEADING (2); PUBLIC OFFICIALS.

CONSTRUCTION OF CHARTER—See MUNICIPAL CORPORATIONS (11).

CONSTRUCTION OF CONTRACT—See RELEASE (1).

CONSTRUCTION OF STATUTE—See DEEDS (8); MUNICIPAL CORPORATIONS (16); TAXATION (9).

CONSTRUCTION OF WILL—See WILLS (7).

CONTRACT OF EMPLOYMENT—See TELEGRAPHS AND TELEPHONES (2).

CONTRACTS.

1. Testimony to the effect that plaintiff rented a quantity of theatrical costumes to the defendant, which transferred its assets and business to another company, incorporated for the purpose of conducting such theatrical business as defendant had carried on, that the managers of the two companies were the same, that plaintiff continued providing the rented costumes and defendant paid part of the rental, sending a check for the last amount subsequently to the change, signed by the manager of both corporations, but ceased to pay for rentals accruing after the transfer of its assets, contending that the later concern owed the debt, was insufficient as a matter of law to estop plaintiff from recovering against the original debtor on the theory that a novation had been effected. *Weingarden* v. *Theatre Co.*, 220.

2. And although defendant claimed plaintiff had been notified in conversations and by written communications that the defendant had made the transfer to the second corporation, the notice alone did not shift the contract obligation to the other company unless plaintiff expressly or impliedly consented to accept a new debtor in the stead of the defendant. *Id.*

3. Where plaintiff sued to recover one-half of the scaler's wages, alleged to have been paid by him pursuant to an oral contract with defendant that each should pay one-

Digitized by Google

CONTRACTS—Continued.

half, positive testimony by plaintiff that said contract was made subsequent to the written contract, the record as a whole sustaining this contention, he was properly allowed to recover, notwithstanding defendant's denial of any such arrangement at any time. *Martindale* v. *Manufacturing Co.*, 477.

4. Where defendant's logging contract gave it the right to stop the work if it was not being done properly and satisfactorily, and defendant stopped the cutting, claiming that plaintiff already had more logs cut than he could haul to the landing, in an action for damages for breach of contract and consequent loss of profits, the court properly instructed the jury that if an honest, fair-minded lumberman of ordinary intelligence, experience, and prudence would not have believed that the plaintiff, under the circumstances then existing, could haul the logs before the contract date expired, then plaintiff could not recover, but that if he had not been stopped he could have completed the contract of cutting and hauling, he could recover the difference between the contract price and the cost of putting in such logs as he could cut and haul. *Id.*

5. The validity and construction of a contract are controlled and to be determined by the laws of the *situs* or place where the contract was entered into, while the remedy for enforcing a foreign contract is regulated by the laws of the forum or country where such remedy is pursued. *Millar* v. *Hilton*, 635.

See BROKERS (3); CANCELLATION OF INSTRUMENTS (4); COMPROMISE AND SETTLEMENT (3-5, 7); DURESS (1); ESTATES OF DECEDENTS (3); FRAUDULENT CONVEYANCES (1); LIMITATION OF ACTIONS (6); MUNICIPAL CORPORATIONS (5, 9-14); PLEADING (3); PRINCIPAL AND AGENT; RELEASE (1); SALES.

CONTRIBUTING CAUSE—See INTOXICATING LIQUORS (1).

CONTRIBUTION—See RELEASE (1); TRUSTS (4).

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (2); CARRIERS; EVIDENCE (12); MASTER AND SERVANT (23); NEGLIGENCE (8); RAILROADS; STREET RAILWAYS (1, 2).

CONVEYANCES—See INJUNCTION; MECHANIC'S LIENS (2).

CONVEYANCES BY EXECUTOR—See MORTGAGES (4).

CORPORATIONS.

1. A transfer of all the assets of a building and loan association to the secretary, director, and majority stockholder, by a resolution of the board of directors, which met on notice that was not duly mailed to the proper address of one director, who had been selected without his knowledge to act on the board, and which consisted of this direc-

Digitized by Google

CORPORATIONS—Continued.

tor, a brother of the secretary and defendant secretary, was void, because of the trust relations existing between defendant and the association, although there was a previous deed executed to the secretary and a third party, the latter conveying to the defendant, and though the pretext for the deeds was to secure defendant from liability on certain mortgage indebtedness of the corporation for which defendant was personally liable. *Shaw* v. *Hehl*, 425.

2. *Held*, also, that an earlier deed, which defendant did not appear to have relied on, did not preclude the association from questioning the validity of the subsequent transfer. *Id.*

3. As the statutory liability of corporate directors for the debts contracted since the filing of the report preceding the default or refusal to file the annual report did not, prior to the amendment of 1915 (Act No. 142), extend to an indebtedness arising after default, the directors of a corporation were not liable for an indebtedness contracted in 1911 after noncompliance with the statutory requirements in and for the previous year, though the time of incurring the same preceded another default; no report being filed in 1909, 1910, or 1911. Act No. 137, Pub. Acts 1907 (4 How. Stat. [2d Ed.] § 9543). *American Brass Co.* v. *Emery*, 593.

See EQUITY (4); MUNICIPAL CORPORATIONS (10, 11).

COSTS.

1. Costs in the form of a solicitor's fee were erroneously taxed against the defendant in proceedings for the statutory decree of sale of lands for delinquent taxes (section 66, Act No. 206, Pub. Acts 1893; 1 Comp. Laws, § 3889; 1 How. Stat. [2d Ed.] § 1835). *Auditor General* v. *Nelson*, 93.

2. The propriety of entering an order requiring security for costs of a nonresident complainant in summary proceedings is not reviewable but rests in the discretion of the commissioner. *McCreery* v. *Roff*, 558.

See JUDGMENT (1-3).

COSURETIES—See RELEASE (2).

COTENANTS—See ADVERSE POSSESSION (1).

COUNTIES—See DRAINS (1); MUNICIPAL CORPORATIONS (4, 5).

COUNTY DRAIN COMMISSIONERS—See DRAINS (3).

COUNTY OFFICERS—See MUNICIPAL CORPORATIONS (4).

COURSE OF EMPLOYMENT—See MASTER AND SERVANT (9, 11, 12, 18, 20).

COURT RULES—See PRACTICE (1, 5).

Digitized by Google

COURTS—See MANDAMUS (7).

CREDITOR'S SUITS—See EQUITY (3, 6).

CRIMINAL LAW.

1. Where a witness, in a prosecution for the larceny of a cow, had positively identified respondent as the man who sold him a cow answering the description of the one lost, evidence as to his conversation with the sheriff and the circumstances leading up to his identification of respondent by a photograph, was harmless error. *People* v. *Eagle*, 404.

2. In a prosecution for the unlawful sale of beer in a local option county, testimony that another party present purchased and paid for beer on the same occasion was admissible to refute the contention that the act was merely one of a hospitable nature, and to impeach respondent who testified to the defense alleged. *People* v. *Plummer*, 415.

3. The trial court did not commit error in refusing to compel the people to indorse as a witness, on the information, the name of one who lived with respondent and upon whom marked money was found that the police had procured to be used in the buying of beer, and who was not, in fact, present when the liquor was furnished; the record also showing that the respondent had objected to the testimony relating to the finding of the marked money, and that the court had struck it out, later, on respondent's motion, restoring the proof to form the basis of the motion to indorse the additional name on the information. The subject was a matter that rested in the discretion of the court. *Id.*

4. An agent of the police, employed to secure, not evidence of a crime committed, but evidence of a crime to be committed by the procurement of the agent, is not a person whose testimony upon the subject of the crime is generally received, in or out of court, without close scrutiny; but it is not the right of a respondent to have the jury instructed to regard his testimony favorably or unfavorably. *Id.* 416.

See DIVORCE (1); INTOXICATING LIQUORS (2, 3).

CRIMINAL PROSECUTION—See MALICIOUS PROSECUTION (2).

CROSS-EXAMINATION—See WITNESSES.

CROSSING ACCIDENT—See RAILROADS (1); STREET RAILWAYS (1).

CROSSINGS—See RAILROADS (1-3).

DAMAGES.

1. Upon somewhat conflicting testimony, a verdict of the jury, in a personal injury case, for $500 damages, was not excessive for a broken rib, pain in the side and leg, and a bruise on the hip, causing plaintiff to be absent from work

Digitized by Google

DAMAGES—Continued.

and confined to the bed five weeks, and to pay out $40 in expenses, so as to require the granting of a new trial. *Ponke* v. *Railway*, 74.

2. *Held*, that plaintiff's proofs were sufficient to support a verdict for that amount, on motion for a new trial, the testimony relative to the loss of time and the extent of physical injury sustained by plaintiff being in dispute. *Id.* 75.

3. While the Michigan railroad liability act, Act No. 104, Pub. Acts 1909, allows probable future earnings to be included as damages if the death was not instantaneous, a different rule prevails in the application of the Federal act. U. S. Comp. Stat. 1913, §§ 8657-8665. *Jorgensen* v. *Railway Co.*, 537.

4. Accordingly, the trial court erred in charging the jury, under the Federal statute, that future earnings might be taken into consideration in awarding damages. *Id.*

5. The legal duty of the buyer, on breach of a contract of sale, to minimize his damages so far as possible does not deprive him of his right to recover in case he made no inquiries about market values before he purchased, but his maximum recovery should not exceed the amount to which he could have reduced his damages if he had sought for and obtained such bids. *Sauer* v. *Construction Co.*, 577.

6. *Held*, also, that the amount of the verdict was not excessive, and that the award of less than certain witnesses testified the difference between market price and contract price amounted to was sufficiently justified by plaintiff's evidence. *Id.* 578.

7. The measure of damages for failure to deliver steel ordered was the difference between the contract price and market price at the time and place of delivery. *Id.*

8. Taking into consideration the amount of the verdict, which was less than the difference between the contract price and the price paid by plaintiffs for the steel, the reception of evidence offered by the plaintiffs as to the bids that they received about the time of entering into the contract was not prejudicial. *Id.*

See APPEAL AND ERROR (6); CONTRACTS (4); EVIDENCE (5-8); MUNICIPAL CORPORATIONS (5); TELEGRAPHS AND TELEPHONES; TRESPASS VI ET ARMIS (3, 4).

DEATH—See APPEAL AND ERROR (7); DAMAGES (3, 4); MASTER AND SERVANT (3, 14); NEGLIGENCE (4); PLEADING (1); STREET RAILWAYS (2).

DEATH ACT—See ESTATES OF DECEDENTS (4); EVIDENCE (4-6).

DEBTOR AND CREDITOR—See EQUITY (3, 4, 7, 8).

DECLARATIONS OF DECEDENT—See WILLS (1, 4).

Digitized by Google

DECREE IN FEDERAL COURT—See DEEDS (3).

DEDICATION FOR PARK—See INJUNCTION; MUNICIPAL CORPORATIONS (1).

DEED AS MORTGAGE—See QUIETING TITLE (3).

DEEDS.

1. Complainant's predecessor in title entered his claim to timber lands in the Upper Peninsula which were part of the Federal grant for railroad construction enacted in 1866. Congress subsequently declared a forfeiture of all property so granted, excepting *bona fide* homestead claims, supported by actual occupancy; also confirming title in the Lake Superior Canal Company as to a portion. Some litigation arose between the canal company and the settlers, and the United States filed a bill in equity against the company and the claimants, aforesaid, whose rights were held to depend on the *bona fides* of their homestead occupancy—a question later raised and litigated in a suit involving the attempted forfeiture. In 1896 a decree was entered determining that the company that had succeeded to the title and rights of the canal company was vested with title and that the complainants had no interest therein; and the company's rights were quieted by the final order of the court. The predecessor in title obtained a quitclaim of these corporate rights and conveyed the lands to complainant. In 1908 the complainant and defendant joined in a lease of the property for mining purposes, carrying out the provisions of a previous option. Defendants' rights were based on an alleged deed of a quarter interest from complainant, who denied its execution. *Held*, on appeal, that the evidence to impeach the deed was insufficient to satisfy the burden of proof in such cases and that the usual presumption arising from the acknowledgment should prevail; also that complainant was estopped by his deed, with the accompanying warranties, from asserting any claim upon the basis of interests secured thereafter. *Donohue* v. *Vosper*, 78.

2. The notarial certificate of a sealed conveyance carries with it the presumption that the officer who made it certified to the truth and that he was not guilty of wrongful action. *Id.*

3. Where the Federal decree, in addition to other findings, recited that the title to the said real property at the time of commencement of suit was vested in the canal company (passing thence to its successor), and that complainant and defendants had no rights in the lands at the time of commencing suit, the decree did not transfer any interest from complainant and his grantee to the corporation, hence, no warranties passed with the real estate to the corporation and its quitclaim deed to complainant and defendant created no rights in them by reason of any cove-

Digitized by Google

DEEDS—Continued.

nants of warranty in a previous conveyance. *Held*, also, that it was not because of a release contained in the decree that defendant had no title, as found by the court, but the decree determined as of the time stated that he owned no interest to be affected by the release. *Id.* 79.

4. But possession of the said lands held by the warrantor necessarily inured to the benefit of the defendant when complainant later acquired title. *Id.*

5. One claiming estoppel by warranty must show that he has been evicted before he can set up the estoppel by virtue of covenants in his conveyance. *Id.*

6. The subsequently acquired estate passes by direct operation of law without the intervention of equity or of any other court. *Id.*

7. The grantee under a quitclaim deed takes with notice of any defects in his grantor's title and subject to previous unrecorded warranty deeds. *Id.*

8. Complainant is not aided by Act No. 199, Pub. Acts 1915, or 3 Comp. Laws, § 8988, changing the rule of law as to notice in case of conveyance by quitclaim, because nothing contained in the statute indicates the intent of the legislature to change the rule as to conveyances already made. It is a general rule that statutes are not to be construed retroactively, unless it clearly appears that such was the intention of the legislative body. *Id.*

See CANCELLATION OF INSTRUMENTS (1); CORPORATIONS (1); EJECTMENT; ESCROWS; FRAUDULENT CONVEYANCES (1); HUSBAND AND WIFE; TRUSTS (2, 3).

DEFAULT IN FILING REPORT—See CORPORATIONS (3).

DEFECTIVE APPLIANCES—See NEGLIGENCE (7).

DEFECTIVE MACHINERY—See MASTER AND SERVANT (1).

DEFENSES—See BILLS AND NOTES (2, 3); RELEASE (2).

DEFINITION—See MUNICIPAL CORPORATIONS (2).

DEGREE OF CARE—See NEGLIGENCE (7).

DELAY—See LANDLORD AND TENANT (2); PRACTICE (5).

DELIVERY—See ESCROWS.

DEMURRER—See EQUITY (2, 7, 8); MUNICIPAL CORPORATIONS (15); PLEADING (3); WATERS AND WATERCOURSES (1).

DEPENDENTS—See MASTER AND SERVANT (3-5).

DEPUTY TOWNSHIP CLERKS—See DRAINS (5).

DESCENT AND DISTRIBUTION—See WILLS (5).

Digitized by Google

DESCRIPTION OF REAL PROPERTY—See EJECTMENT; MECHANIC'S LIENS (1).

DESTRUCTION OR LOSS OF INSTRUMENT—See WILLS (3).

DETROIT CHARTER—See TAXATION (8).

DEVISE—See WILLS (5).

DIRECTED VERDICT—See APPEAL AND ERROR (2); COMPROMISE AND SETTLEMENT (4, 5); EVIDENCE (3); INSURANCE (3); MALICIOUS PROSECUTION (3); SALES (3, 9); STREET RAILWAYS (3); TELEGRAPHS AND TELEPHONES (1).

DIRECTOR'S LIABILITY—See CORPORATIONS (3).

DISMISSAL—See APPEAL AND ERROR (4).

DISPOSITION OF INFANT AS ELEMENT OF DAMAGES—See EVIDENCE (4, 7).

DIVERTING STREAM—See WATERS AND WATERCOURSES (1).

DIVIDED COURT—See APPEAL AND ERROR (3).

DIVORCE.

1. Punitory proceedings for contempt of the court of chancery against a husband who neglects to pay alimony awarded by a decree of divorce are contingent upon his being found within the jurisdiction of the court. The effect of such decree is also to deprive the wife of her remedy by criminal proceedings under a charge of abandonment. *Lacey* v. *Lacey*, 271.

2. It was erroneous for the court to grant a divorce to complainant who filed a bill to obtain support and maintenance pursuant to Act No. 243, Pub. Acts 1889, 3 Comp. Laws, §§ 8686, 8687, and who did not desire an absolute divorce; where the defendant husband filed a cross-bill and the court in reviewing the evidence held that his charges had not been sustained by the evidence, finding, also, that the complainant's bill was sustained by the proofs, which showed, among other things, that the husband had frequently desired her to secure a divorce, and she had declined. *Id.* 272.

3. Where the wife expressed her willingness to renew marriage relations and was ready to do so for the sake of their infant, it was not in the interest of the public that an absolute divorce should be granted against her consent. *Id.*

4. Testimony pro and con in a suit for divorce tending to show a miserly disposition on the part of the husband, and harsh or cruel treatment, *held*, to warrant a decree for the complainant wife. *Culley* v. *Culley*, 496.

5. Where the questions involved in a suit for divorce are questions of fact and the witnesses are greatly at variance as to the circumstances, the opportunity to observe their bear-

Digitized by Google

DIVORCE—Continued.

ing and manner upon the witness stand is of great importance, and before reversing a decree the Supreme Court must be fully persuaded that it would necessarily have reached a different conclusion had it occupied the position of the court appealed from and been favored with all the advantages of that court for judging rightly. *Id.*

6. *Held*, in a suit for divorce, that the complainant's testimony showing cruelty of her husband sustained the granting of a divorce, and that an award of alimony of $4,000 worth of realty, out of property worth $11,000, and $800 cash, with a solicitor's fee of $150, was not excessive. *Collins* v. *Collins*, 659.

See CANCELLATION OF INSTRUMENTS (1).

DOMICILE OF PERSON TRAVELING—See LIMITATION OF ACTIONS (2).

DOWER—See CANCELLATION OF INSTRUMENTS (5).

DRAIN CONTRACT, BREACH OF—See MUNICIPAL CORPORATIONS (3, 5, 6).

DRAIN DISTRICTS—See MUNICIPAL CORPORATIONS (4).

DRAINS.

1. Act No. 254, Pub. Acts 1897, amended by Act No. 185, Pub. Acts 1911, provides for a petition by five freeholders of any county in which a drain is to be laid out, showing the necessity for it, etc., and provides upon receipt of the petition for the drain commissioner's giving notice to the other county commissioners wherein the drain may be situated and that all shall meet and take measures such as are provided by the statute and proceed as required by chapter 8. It is enacted in section 2, chap. 7, that the said commissioners shall meet and perform all duties that county drain commissioners are charged with in establishing distinct drains. In chap. 3, and the later amendment thereto (Act No. 185, Pub. Acts 1911), the drain commissioners are directed to notify the several township clerks in whose territory the drain may be located of the filing of a petition, and to designate a place for the meeting of township boards which the clerks are to call; to make a survey, etc. *Held*, that failure to notify and call meetings of the township boards was not fatal to a proceeding to establish a drain in more than one county: that there was no official action necessary for such boards to take and the acts of the commissioners were regular without having the several boards pass on the necessity for the improvement. *Norton* v. *Williams*, 69.

2. The question of the necessity and benefit of a drain which lies in more than one county is for the several commissioners. No action of the township boards is required. *Id.* 70.

Digitized by Google

DRAINS—Continued.

3. No fraudulent conduct on the part of the county drain commissioners could be inferred from the fact that they determined to establish a separate drain not including one in existence, which was not an essential part of the larger improvement. *Id.*

4. Upon certiorari to determine the validity of certain drain proceedings, it was essential to present competent evidence of the alleged facts that one of the jurors had been paid, in the probate proceedings, to convey the other jurors to the drain in question; mere allegations in the petition, unsupported, were not sufficient. *Id.*

5. The office of deputy clerk of a township is one authorized by the statute, and unless his powers are limited by the statute he may perform any act which his principal may perform. And, hence, in a suit to enjoin the deepening and widening of a drain and preserve the level of an inland lake, the determination of the deputy clerk, acting with the justices of the peace as town board, that the drain was a necessary public improvement, was lawful and sufficient, as he was the representative of the township clerk. *Kennedy* v. *Drain Com'r*, 676.

6. Under Act No. 202, Pub. Acts 1911, the drain commissioner is not without authority to perform his duties and to deepen and widen a public drain because it would affect the level of an inland lake, the statute containing no provision against the lowering of such waters and the provisions thereof being optional rather than mandatory. *Id.*

See WATERS AND WATERCOURSES (2-4).

DRAINS, CONSTRUCTION OF—See MUNICIPAL CORPORATIONS (3).

DURESS.

1. Threats of prosecution, unaccompanied by any threat of immediate imprisonment, do not amount to duress. *Voorhees* v. *Nelson*, 684.

2. Where plaintiff entered into a fraudulent transaction with several others to wager money on a horse, understanding that the opposing jockey had been bribed to throw the race to the horse on which plaintiff was betting, but the race did not result as they anticipated, and where defendant N. had been induced by plaintiff to become a party to the fraud and he also placed a considerable sum on the losing horse, and where defendant's agent whom he sent to plaintiff to obtain a settlement after learning that plaintiff had shared in the amounts secured from defendant, made threats of prosecution which intimidated plaintiff and caused him to pay defendant a large sum in settlement of the unlawful transaction, plaintiff not paying the money to defendant until several days had elapsed,

Digitized by Google

DURESS—Continued.

but claiming that he was influenced by the threatened prosecution, he was not entitled to recover on the ground of duress, since there was no evidence of threatened imprisonment, and for reasons of public policy plaintiff should not be permitted to recover money paid as a part of an illegal and fraudulent transaction wherein plaintiff participated as one of the principals. *Id.*

See CANCELLATION OF INSTRUMENTS (1, 2).

DUTY TO LOOK AND LISTEN—See RAILROADS (1, 4).

EFFECT OF BEQUEST ON WITNESS—See WILLS (2).

EJECTMENT.

1. Where plaintiffs in ejectment had conveyed to the defendant a parcel of land described as lots 15, 17, and land lying east thereof, bounded on the northwest by Michigan avenue, east by Milwaukee street, formerly Albany street, on the south by Wesley street and on the west by an alley contiguous to lot 17, and no alley appeared in the original plat, as prepared for filing by the owner, and lot 17 did not have the alleged alley but included said land, described by metes and bounds, that the plat had never been filed in the office of the register of deeds and was at an early date lost, the deed from plaintiffs to defendant carried with it all the property purporting to be transferred, including the alleged alley, which did not show upon the premises and which was not in actual use, and which defendant, who had been in possession as tenant, occupied with the rest of the realty; plaintiffs' contention and evidence that because an abstract furnished to defendant after entering into a contract for the purchase of the land, contained a map with parallel lines that they alleged represented the alley across the lot, is *held* to be insufficient to prove title in the grantors who admitted that no open and used alleyway had ever existed on the lot,—no public or private way existing in fact. And a reservation did not result from describing the parcel as bounded on the west by an alley. *Leever* v. *Lumber Co.*, 181.

ELECTIONS—See MANDAMUS (1-5).

ELEVATORS—See NEGLIGENCE (2, 4, 6).

EMPLOYERS' LIABILITY ACT—See MASTER AND SERVANT (3, 6, 7, 13, 18-21).

EMPLOYMENT INSURANCE—See INSURANCE (1).

ENTRY OF JUDGMENT—See PRACTICE (2).

EQUITABLE DEFENSE—See MORTGAGES (5).

EQUITABLE TITLE—See TRUSTS (3).

Digitized by Google

EQUITY.

1. Chancery Rule 12, fixing the time within which a replication may be filed at fifteen days, recognizes in the chancellor a discretion to extend the time; hence, it was not incorrect practice, on defendant's motion to strike a replication from the files, to deny the request, leaving the replication on file as if properly entered by permission of court after the time stated in the rule, the court being expressly authorized to extend the time thereby. *Blodgett* v. *Circuit Judge*, 9.

2. The defendant's demurrer to a bill in aid of execution admits the facts charged in the bill. *Barber* v. *McMicking*, 266.

3. A bill in aid of execution lies to relieve shares of stock levied upon by complainant from a claim arising out of a transfer in fraud of creditors; relief is not confined to executions against real estate. *Id.*

4. Notwithstanding section 436, 1 Comp. Laws, affecting executions against property of a debtor that have been returned unsatisfied and authorizing a discovery, etc., a complainant who levied on corporate stock standing in the name of the judgment debtor could file a bill in aid of execution when the debtor disclaimed ownership, but declined to say who held the stock, serving a notice to that effect on the complainant as he was about to sell the property upon execution sale. *Id.*

5. It is not essential to the jurisdiction of the court of equity that the complainant should sell the property levied on before applying for the remedy in aid of execution. *Id.*

6. After securing a lien by execution levy, if a fraudulent obstruction has been interposed to prevent carrying out the sale, the creditor may apply to chancery for a discovery and to remove the obstruction. *Id.*

7. A bill in aid of execution lies in the courts of this State to avoid fraudulent transfers made by a bankrupt corporation, the affairs of which are in process of administration in the Federal courts of a foreign State. In cases where the bankruptcy court has jurisdiction the State court has concurrent jurisdiction with it. And the possession of the bankruptcy court determines whether it has jurisdiction. *Union Banking Co.* v. *Manufacturing Co.*, 698.

8. *Held*, on demurrer, that objections raised to the pleading as stating a conclusion and to the question of good faith of subsequent creditors were not necessary to be considered, and that if the averments of the complainant were established at the hearing it would be entitled to relief in some form. *Id.* 699.

See CANCELLATION OF INSTRUMENTS (3); DIVORCE (2); FRAUDULENT CONVEYANCES (2); INJUNCTION; QUIETING TITLE (1); TRUSTS (4, 5).

Digitized by Google

ESCROWS.

Though a deed may be delivered so as to become a valid conveyance by depositing it in escrow with a third party, evidence not showing a completed delivery by the decedent grantor, to the third person, with the intent to leave it for the benefit of the grantee, merely having a tendency to show that it was among the papers of the third person, a brother of the grantor and grantee, *held*, insufficient to establish a valid conveyance. *Shumway* v. *Mason*, 623.

ESTATES BY THE ENTIRETIES—See HUSBAND AND WIFE.

ESTATES IN COMMON—See EXECUTION; HUSBAND AND WIFE.

ESTATES OF DECEDENTS.

1. In a suit by one claiming to have performed services for decedent, opinion evidence to prove the value of claimant's services was improperly rejected by the trial court; its weight was for the jury. *In re Wigent's Estate*, 507.

2. It was also improper to receive in evidence a note for $25 that claimant had given to decedent and that had been adjusted by the commissioners on claims and offered in evidence by defendant not as a set-off but for other purposes. *Id.*

3. Where there was no evidence of an express contract entered into by and between decedent and her cousin, who cared for the latter in her last years, to pay for the services, for which he presented his claim against her estate, the trial court committed reversible error in not instructing the jury that a contract to pay therefor might be implied from the fact that the services were rendered by claimant and accepted by the decedent. Because of the remote relationship between decedent and the claimant, no presumption arose that the services were rendered gratuituously. *Id.*

4. The death act (3 Comp. Laws, § 10436, 5 How. Stat. [2d Ed.] § 13702) is applicable only to cases of instantaneous death. Actions for death that is not instantaneous must be brought under the survival act; and both rights of action for the same injury cannot exist at the same time. *Jorgensen* v. *Railway Co.*, 537.

See FRAUDULENT CONVEYANCES (1); MANDAMUS (6); MORTGAGES (4); WILLS (1).

ESTOPPEL—See COMPROMISE AND SETTLEMENT (1); DEEDS (1, 5); JUDGMENT (1); MORTGAGES (5).

EVICTION—See DEEDS (5).

EVIDENCE.

1. Though testimony of plaintiff in an action for assault and battery against her employer that she had several children, giving their respective ages, was improper, and ought to

Digitized by Google

EVIDENCE—Continued.

have been excluded by the trial court, a ruling admitting the evidence was not prejudicial where it had already appeared that plaintiff had a child, and that the alleged quarrel arose over her request to leave her employment and visit the infant. *Gungrich* v. *Anderson*, 144.

2. On an objection of the defendant that plaintiff was testifying to a conclusion, the court did not err in admitting plaintiff's statement that she declined to work for a week following the assault and that it was because of the injury she had received in the assault. *Id.*

3. Where plaintiff brought suit on a promissory note that defendant charged had been executed for the accommodation of the plaintiff, who, on his part, claimed that the note was given him for professional services as an attorney, the question at issue was one of fact, upon irreconcilable testimony; the trial court erred in directing a verdict for plaintiff. *Alpert* v. *Plotkin*, 232.

4. In an action for killing plaintiff's daughter, who was hit by defendant's car at a street crossing, and who was shown to be only five years and three months old at the time of the injury, it was error to exclude interrogatories of plaintiff's attorney as to what was the disposition and tractability of the child and what was the difference between the value of her help and the expenses of clothing and other necessaries; also whether her assistance would grow more valuable as she became older. *Sceba* v. *Railway Co.*, 308.

5. Testimony that tended to throw some light upon what the pecuniary loss resulting from an infant's death might be was admissible, and it has been held that some showing of injury or loss must appear. *Id.*

6. The law presumes, in the case of an infant's death by wrongful act, that there has been a loss for which compensation may be given under the statute, and the loss may be estimated from the facts proved, in connection with the knowledge and experience possessed by all persons, in relation to matters of common observation. *Id.* 309.

7. And it was improper to rule out testimony of the child's teacher as to her disposition and habit of obedience, upon the alleged ground that it related to the school only. *Id.*

8. On error to review the denial of a motion for a new trial, the size of a verdict for plaintiff amounting to $71, covering the evidence relating to funeral and burial expenses only, was not so greatly insufficient as to require the court to reverse the case. *Id.*

9. In a personal injury case, for being run down by defendant's automobile, in the dark, testimony of an eyewitness, that from the exhaust of the car it appeared to be going 30 miles an hour, was immaterial and should have been

Digitized by Google

EVIDENCE—Continued.

struck out, since the speed of a car has no necessary relation to the rapidity of the exhaust if the clutch is out; but the witness having expressed his opinion that the rate of speed, independently of the exhaust, was about 20 miles an hour, the error in admitting the testimony was harmless. *Harnau* v. *Haight*, 600.

10. The opinion of a witness who had been an engineer, and whose qualifications were established to form such judgment, that an automobile which he only saw move over a space of 20 feet before it struck plaintiff was moving at the rate of 20 miles an hour, was properly admitted, and its weight was for the jury. *Id.*

11. While testimony that there were no lights on defendant's automobile was not properly rebuttal, the court did not err in the exercise of its discretion by receiving the evidence. *Id.*

12. Where the plaintiff's contention was that he was riding along the street on a bicycle when defendant approached from the rear without lights and ran him down, and the contention of the defense was that plaintiff turned from the side and ran into the car, it was not error to exclude from the evidence an ordinance of the city wherein the accident occurred requiring vehicles that move slowly to keep as close as possible to the curb, on the right, allowing more swiftly moving vehicles free passage to their left; as the issues were such as to render the ordinance immaterial, the contributory negligence of plaintiff not being in issue if plaintiff's evidence was believed, and the fact of being on the wrong portion of the road not affecting the claim of the defense that plaintiff without excuse turned into the moving automobile. *Id.*

See BILLS AND NOTES (1, 3); BROKERS (3); COMPROMISE AND SETTLEMENT (1, 4, 5, 7); CRIMINAL LAW (1, 2, 4); DAMAGES (5, 8); DEEDS (1); DIVORCE (4); DRAINS (4); ESCROWS; ESTATES OF DECEDENTS (1, 2); HIGHWAYS AND STREETS (1); INSANE PERSONS (1); INSURANCE (2, 3); LANDLORD AND TENANT (3); MALICIOUS PROSECUTION (1, 3); MASTER AND SERVANT (4, 11, 15, 17, 18, 21); MECHANIC'S LIENS (3); NEGLIGENCE (2, 6); NEW TRIAL (2); QUIETING TITLE (3, 4); RELEASE; SALES (2, 4-6,.9); STREET RAILWAYS (1, 3); WILLS (1, 4); WITNESSES.

EXCAVATION—See MUNICIPAL CORPORATIONS (7).

EXCEPTIONS—See APPEAL AND ERROR (1); NEGLIGENCE (6).

EXCEPTIONS TO RULE OF SAFE PLACE—See MASTER AND SERVANT (23).

EXCESSIVE FORCE—See MASTER AND SERVANT (16).

EXCESSIVE VERDICT—See DAMAGES (6, 8); TRESPASS VI ET ARMIS (4).

Digitized by Google

EXECUTION.

The interest of a tenant in common is subject to levy and sale upon execution. 3 Comp. Laws, § 9167. *Michigan State Bank* v. *Kern*, 467.

See DEEDS (1); EQUITY (4, 6); FRAUDULENT CONVEYANCES (2).

EXECUTORS AND ADMINISTRATORS—See MANDAMUS (6).

EXEMPTION—See TAXATION (6, 9, 10).

EXPERT WITNESSES—See ESTATES OF DECEDENTS (1).

EXPRESS TRUST—See TRUSTS (1).

EXPRESS WARRANTY—See SALES (7).

EXTENDING TIME—See EQUITY (1).

EXTENT OF INJURIES—See DAMAGES (2).

EXTRA COMPENSATION—See PRINCIPAL AND AGENT (1, 2).

EXTREME CRUELTY—See DIVORCE (4, 6).

FEDERAL RAILROAD LIABILITY ACT—See DAMAGES (3, 4); PLEADING (1, 2).

FENCES—See BOUNDARIES (1).

FINAL ACCOUNT—See MANDAMUS (6).

FINDINGS—See PRACTICE (1, 2).

FIRES—See MASTER AND SERVANT (2).

FLOODING LANDS—See WATERS AND WATERCOURSES (2).

FORECLOSURE—See MORTGAGES (1-3, 5).

FOREIGN CONTRACT—See BILLS AND NOTES (4); CONTRACTS (5); LIMITATION OF ACTIONS (4-6).

FOREIGN CORPORATIONS—See MANDAMUS (8).

FORFEITURE—See COMPROMISE AND SETTLEMENT (6).

FORUM—See BILLS AND NOTES (4); LIMITATION OF ACTIONS (6).

FRATERNAL INSURANCE—See INSURANCE (3).

FRAUD—See DRAINS (3); DURESS (2); INSURANCE (3); MUNICIPAL CORPORATIONS (9); TAXATION (4).

FRAUDS, STATUTE OF—See SALES (10, 11).

FRAUDULENT CONVEYANCES.

1. In a suit to cancel a deed made by an intestate, who had arranged with his housekeeper to reward her care and services by devising to her his real estate, consisting of village

Digitized by Google

FRAUDULENT CONVEYANCES—Continued.

property worth $2,000 or upwards, but who conveyed the realty to defendant before his death, conflicting testimony reviewed, and *held*, to warrant the decree of the lower court for the complainant administrator; also that notice to defendant of the rights and claim of the claimant (who had secured the allowance of her claim before the probate judge) was established by proof of defendant's admissions. *Merriman* v. *Vandemark*, 226.

2. Where complainant's bill to set aside a conveyance by a debtor husband to himself and wife was filed on the theory that said conveyance created a tenancy by the entireties and was in fraud of creditors, and it does not clearly appear that the husband's interest in the estate in common which was thereby created is sufficient to satisfy the judgment and costs, the bill will not be dismissed, but in case the husband's interest in the property is insufficient to satisfy the judgment, complainant may proceed to sell the remainder thereof, except the homestead rights. *Michigan State Bank* v. *Kern*, 467.

See EQUITY (4, 7).

FRAUDULENT REPRESENTATION—See SALES (6).

FUTURE EARNINGS—See DAMAGES (3, 4).

GOOD FAITH—See CORPORATIONS (1); EQUITY (8); TRUSTS (3).

GUARDIAN AND WARD—See INSANE PERSONS.

HARMLESS ERROR—See CRIMINAL LAW (1).

HEARSAY—See BILLS AND NOTES (3); NEGLIGENCE (6).

HEIRS—See WILLS (5-7).

HIGHWAYS AND STREETS.

1. In proceedings to restrain defendant from laying out a highway along a quarter line from the section center, according to a survey made by the highway commissioner, also involving the discontinuance of an existing highway claimed not to have been located on the correct line, *held*, that the finding of the trial court that the proposed highway was not located correctly but south of the true quarter line, by mistake, was supported by competent evidence, that it justified a decree granting an injunction against the establishing of the highway. *Loud* v. *Deacon*, 177.

2. A property owner who plants trees in the street does so with the understanding that they can remain there only so long as the space used is not required for public purposes. *Falls* v. *Railway Co.*, 645.

See ADVERSE POSSESSION (4, 6); MUNICIPAL CORPORATIONS (15-18); STREET RAILWAYS (5).

Digitized by Google

HOLDER IN DUE COURSE—See BILLS AND NOTES (1).

HOME—See LIMITATION OF ACTIONS (2).

HOMESTEADS—See FRAUDULENT CONVEYANCES (2).

HUSBAND AND WIFE.

A deed executed by a husband to himself and his wife creates a tenancy in common, and not one by the entireties. *Michigan State Bank* v. *Kern*, 467.

See BILLS AND NOTES (5); CANCELLATION OF INSTRUMENTS (1, 5); DIVORCE (1); EXECUTION; SALES (9); WILLS (1, 5, 7).

IDENTITY OF LOCUS—See ADVERSE POSSESSION (4).

IDENTITY OF PERSON—See MECHANIC'S LIENS (3).

ILLEGAL SALES—See CRIMINAL LAW (2).

ILLEGAL TRANSACTION—See DURESS (2).

IMPLIED CONTRACT—See ESTATES OF DECEDENTS (3).

IMPLIED WARRANTY—See SALES (6, 7).

INAPPROPRIATE USE—See INJUNCTION.

INCREASE BY BOARD OF REVIEW—See TAXATION (2).

INCREASE OF SALARY—See CONSTITUTIONAL LAW; PUBLIC OFFICIALS.

INDEMNITY POLICY—See INSURANCE (1).

INDICTMENT AND INFORMATION—See CRIMINAL LAW (3).

INDORSEMENT BY WIFE—See BILLS AND NOTES (5).

INDORSING WITNESS' NAME—See CRIMINAL LAW (3).

INDUSTRIAL ACCIDENT BOARD—See APPEAL AND ERROR (7); MASTER AND SERVANT (3, 6-8, 18, 21).

INFANTS—See EVIDENCE (4-6); INTOXICATING LIQUORS (1); RAILROADS (1, 2).

INITIAL, INSTEAD OF CHRISTIAN NAME—See MECHANIC'S LIENS (3).

INJUNCTION.

Equity will interfere, at the instance of an adjacent proprietor, to restrain a city from making unlawful use of property dedicated by the original owner as a park, with the express limitation that no other use should be made of it, provided that the municipality makes use thereof in any manner not intended, and inappropriate for a public park. *Dodge* v. *Improvement Ass'n*, 16.

See HIGHWAYS AND STREETS (1); MUNICIPAL CORPORATIONS (1, 9); WATERS AND WATERCOURSES (4).

Digitized by Google

INLAND LAKES—See DRAINS (6).

INSANE PERSONS.

1. It is not proof of mental incompetency, standing alone, that respondent frequently changed her mind, or made bad business bargains, or that she failed to pay the agreed amount for driving a well. *In re Chappell's Estate*, 526.

2. Under section 8709, 3 Comp. Laws, the term "mentally incompetent" as used, refers to a person whose mind has become so affected as to have lost control of itself to such a degree as to deprive the person affected of sane and normal action. *Id.*

INSPECTION—See SALES (6, 8).

INSTRUCTIONS—See APPEAL AND ERROR (5, 9); AUTOMOBILES (1); COMPROMISE AND SETTLEMENT (5, 6); DAMAGES (4); ESTATES OF DECEDENTS (3); LANDLORD AND TENANT (2); NEGLIGENCE (7, 8); PRINCIPAL AND AGENT (2, 3); SALES (8, 11); TRESPASS VI ET ARMIS (3); TRIAL (2, 3).

INSUFFICIENT VERDICT—See EVIDENCE (8).

INSURANCE.

1. Under a mutual benefit certificate providing for insurance against loss of employment in cases other than discharge for absence from engine, use of liquors and similar reasons, and referring to the application which contained the clause, "that the cause assigned by my employer for suspension or discharge shall be the sole basis of determining the liability of the association," plaintiff was not entitled to recover on his own showing that the employer discharged him for being absent from his engine and visiting saloons, and he was properly prevented at the trial from attempting to prove that the assigned cause was untrue; that he had been absent with leave and visited certain saloons on a mission of his superintendent. *Palmer* v. *Protective Ass'n*, 35.

2. In an action upon an insurance policy the burden was not upon plaintiff to show a consideration for attaching a loss payable clause stating that the insurance should be payable to the insured or his vendor as their interests might appear; it rested upon the defendant to establish its contention if it relied upon lack of consideration,—an affirmative defense. *Gourlay* v. *Insurance Co.*, 384.

3. Where the testimony of defendant's examining physician showed, on cross-examination, at the trial of an action on a benefit certificate, although he had stated affirmatively in his direct examination that decedent answered a question in her application relating to pregnancy by "No," that he did not recollect definitely actually asking the question, the trial court did not err in submitting the issue of decedent's alleged fraud to the jury. *Clark* v. *North American Union*, 589.

Digitized by Google

INSURANCE—Continued.

4. *Held*, also, on motion for a new trial, that the verdict was not so opposed to the weight of the evidence as to require the court to grant a new trial. *Id.*

INTENT—See ESCROWS; INTOXICATING LIQUORS (4); MUNICIPAL CORPORATIONS (14); TAXATION (5).

INTERSTATE COMMERCE—See PLEADING (1).

INTERURBAN ROAD—See STREET RAILWAYS (1).

INTOXICATING LIQUORS.

1. Where plaintiff, in a civil-damage action, had received injuries to his person as the result of reckless driving of a minor with whom he was riding in an automobile that they borrowed without the owner's consent, and where it appeared that they had visited several saloons and became intoxicated, and that the plaintiff treated the minor, who in his turn had paid for refreshments for both, plaintiff, being of age, was chargeable with helping to bring about the accident and could not recover damages under 2 Comp. Laws, § 5398 (2 How. Stat. 2d Ed. § 5074), which creates a remedy against the saloon keeper for the benefit of innocent third persons. *Morton* v. *Roth*, 198.

2. Where respondent owned a building that was occupied by him in his business, being the headquarters of a fishing club, whose members kept liquor stored upon the premises and drank there, and beer was shipped to his place in cases with the owner's name attached, and where the practice in purchasing the liquor was to have the owner sign an order for the beer, and the respondent placed the order with the wholesaler, who held him responsible for the price, and in supplying club members with the liquor it was obtained by means of a service card on which a record of the liquor supplied was kept by a series of punches, respondent controlling and delivering the beer as wanted, he was guilty of furnishing liquor to a female minor who came to the club quarters with a member and two companions, to whom respondent brought in four bottles of beer and glasses for each person, and where all four were present in the parlor, when he brought in the beer, and it was charged or punched on the service card of the member; under the statute (Act No. 160, Pub. Acts 1909) the fact that the club member owned the beer was no excuse. *People* v. *Lumley*, 613.

3. That the club member was also guilty did not relieve the respondent from responsibility: there may be a joint furnishing of the liquor. *Id.* 614.

4. Under section 2, Act No. 160, Pub. Acts 1909, intent is not made an ingredient of the offense and ignorance of the fact that the female was a minor did not constitute a defense. It was his duty to see to it that there were

Digitized by Google

INTOXICATING LIQUORS—Continued.

no minors in the party before furnishing them with liquor. *Id.*

See APPEAL AND ERROR (4); CRIMINAL LAW (2, 3); MANDAMUS (1).

INURING OF TITLE—See DEEDS (4).

JOINT OFFENSE—See INTOXICATING LIQUOR (3).

JUDGMENT.

1. Where the defendant in a suit in justice's court secured an order of the court to compel the plaintiff to file security for costs, and afterwards removed the judgment by certiorari to the circuit court, claiming that plaintiff had failed to comply with the order, and that security offered in the form of a paper signed by a surety was insufficient and invalid because the surety had not appeared before the justice, he could not recover the costs taxed in the circuit court, after judgment in his favor, from the surety in the undertaking; he was bound by the judgment, and precluded or estopped from basing his action on the writing which his counsel had previously argued was invalid. *Patek* v. *Ryskewiecz*, 344.

2. In the light of the holding of the court, no sufficient consideration for the instrument was shown and it was not a valid common-law obligation. *Id.*

3. The question whether the assignment to plaintiff of the judgment carried with it said undertaking for costs will not be considered where it was not briefed or raised by the defendant. *Id.*

4. Notwithstanding a statutory requirement that the clerk of the court give notice to the interested parties or their attorneys of any order or judgment entered in vacation, attorneys are charged with notice of all orders and judgments entered during a term of court in any cause which is in condition for the same. *Wisconsin Chair Co.* v. *Circuit Judge*, 548.

See MANDAMUS (5); MUNICIPAL CORPORATIONS (4); PRACTICE (2, 3).

JUDICIAL UNDERTAKING—See JUDGMENT (1-3).

JUNIOR INCUMBRANCER'S RIGHTS—See MORTGAGES (1-3).

JURISDICTION—See CANCELLATION OF INSTRUMENTS (5); EQUITY (5, 7); MANDAMUS (7); MASTER AND SERVANT (6, 8).

JURY—See DRAINS (4).

JUSTICES OF THE PEACE—See JUDGMENT (1).

KIN—See MASTER AND SERVANT (4).

Digitized by Google

LANDLORD AND TENANT.

1. A tenant cannot plead an independent set-off in defense of an action brought by the landlord to dispossess him for nonpayment of rent; and no presumption of law can arise against the tenant for failure to insist upon such set-off as against the rent when it falls due. *Fuller* v. *Metcalf*, 520.

2. Accordingly, it was erroneous to instruct the jury, on the trial of an action for rent, which the defense contended should be reduced by certain amounts expended for repairs or improvements that the plaintiff authorized the tenant to install, charging the cost to the former, that the failure of the defendant to insist on his set-off, when he paid the rent, raised a presumption, which was not conclusive, but which the jury had a right to consider, that all matters in difference between the parties were settled when he made the payments. It was for the jury to say whether the delay should be treated as giving rise to an inference unfavorable to the defendant. *Id.*

3. The issue between the parties lay in whether or not plaintiff had authorized the defendant to make the repairs, and had promised to reimburse him. If the jury found for the defendant on this question, the delay in asserting the claim of the defense during a period of three years was not fatal to his right, but he had the burden of establishing his claim. *Id.* 521.

See NEGLIGENCE (4).

LANSING CHARTER—See MUNICIPAL CORPORATIONS (9, 12).

LARCENY—See CRIMINAL LAW (1).

LAW BUSINESS—See PARTNERSHIP (2, 3).

LAW OF CASE—See APPEAL AND ERROR (3).

LAW OF THE ROAD—See AUTOMOBILES (1).

LAYING OUT OF HIGHWAY—See HIGHWAYS AND STREETS (1).

LEX FORI—See CONTRACTS (5).

LIABILITY FOR TORTS—See MASTER AND SERVANT (14).

LICENSEE—See NEGLIGENCE (2, 4).

LIENS—See TAXATION (8).

LIGHTS—See EVIDENCE (11); STREET RAILWAYS (1).

LIMITATION OF ACTIONS.

1. Plaintiff brought assumpsit on an obligation dated more than ten years previous, and which defendants claimed was barred by the statute of limitations. They were actors

Digitized by Google

LIMITATION OF ACTIONS—Continued.

whose location frequently changed and who were out of the State, traveling about the country during most of the ten-year period. It was, however, defendants' claim that they maintained their domicile in Detroit, Michigan, during the whole time and that they often returned to their said place of residence, and had no other domicile. Under 3 Comp. Laws, § 9728 (5 How. Stat. [2d Ed.] § 14135), *held*, that neither absence from nor residence outside the State would suspend the running of the statute, but that both conditions must concur, and the question of defendants' domicile should have been submitted to the jury, upon proofs having a tendency to sustain the claim of either party. *Sproat* v. *Hall*, 28.

2. The profession of an actor who travels from State to State does not preclude him from having a home at a particular place. *Id.* 29.

3. Where the trial court refused to charge as requested that the effect of defendants' alleged residence in Michigan during most of the time during which plaintiff claimed he was outside the State would bar the suit, and where the court stated his opinion to be that defendant must have been within the State a consecutive period of six years, after the demand accrued, and the question might perhaps be one of fact, counsel for the defense concurring but saying that the question of residence in Michigan was as he understood it eliminated by the court, he could not be held to have deterred the trial judge from submitting to the jury the issue as to his residence in the State, and, particularly, in view of requests to charge presented by said attorney bearing upon that issue. *Id.*

4. The Michigan statute of limitations contains no special provisions recognizing the bar of limitations under a foreign statute, as is the case in some States, where, however, it must appear that the period fixed by the foreign statute had fully run and the bar was complete before the defendant came within the jurisdiction of the State. *Millar* v. *Hilton*, 635.

5. Defendants owed plaintiff on a promissory note executed in Canada, where the parties resided, and defendants moved to Michigan, when the note had been due 3 years and a half. In neither place had the statute of limitations run so as to bar an action, at the time plaintiff brought suit in Michigan. *Held*, that the law would not be enforced as a matter of comity in a foreign country and that the two statutes could not be tacked together to bar the right of action. *Id.* 636.

6. In an action begun in one State or jurisdiction upon a contract made in another, a plea of the statute of limitations existing in the place of the contract is not good as a bar to the action, but a plea of the statute existing in the country or State where the suit is in litigation is

Digitized by Google

LIMITATION OF ACTIONS—Continued.

sufficient and as a universal rule, the statute operates merely upon the remedy; the law of the forum, not the law of the *situs* of the contract, controls. *Id.*

See ADVERSE POSSESSION (1, 4).

LINE FENCES—See BOUNDARIES (1).

LOCAL OPTION ELECTION—See MANDAMUS (1).

LOGS AND LOGGING—See CONTRACTS (3, 4); PRINCIPAL AND AGENT (1).

LOSS OF EMPLOYMENT—See INSURANCE (1).

LOSS OF EYE—See MASTER AND SERVANT (18).

LUMBER—See SALES (1).

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, the question of want of probable cause is for the court if the facts are undisputed. *Gilecki* v. *Dolemba*, 107.

2. Probable cause is such reasonable ground of suspicion, supported by known circumstances, or by information of sufficient character, to justify an ordinarily cautious person in believing that the accused is guilty of the alleged crime. *Id.*

3. Where the defendant displayed in the presence of plaintiff, a stranger, a large roll of money which he placed in an unlocked trunk in the lower part of the house, plaintiff being in a position to see the act, and where there was evidence that he was informed by a roomer that some one crept stealthily downstairs in the night and after moving about went outside, that the person coughed like one of the roomers with whom plaintiff was friendly, and that the dog belonging to defendant had been put outside in the night, that plaintiff and the roomer had entered the house together, where, also, defendant related all the facts to a justice of the peace who issued a warrant, the question of probable cause, upon uncontradicted evidence, was for the court, which rightly held that there was no proof of a want thereof. *Id.*

MANDAMUS.

1. Relators, who were qualified electors of the city in which a recount of ballots cast in a local option election was asked and made, were proper parties, in the discretion of the circuit court, to institute mandamus proceedings to test the propriety of recounting certain precincts, for the recognized rule against the intervention of private parties to redress grievances that affect the public is not absolute, but discretionary. *Baldwin* v. *Board of Supervisors*, 372.

Digitized by Google

MANDAMUS—Continued.

2. And where the election was close and the interest of the electors general, and intense, the trial court did not err in determining that the prosecuting attorney was not the only proper party to file a petition for mandamus and that private individuals might ask the intervention of the court. *Id.* 373.

3. Mandamus is the appropriate remedy of such relators to test the right of the board of supervisors to recount the ballots in boxes that had not been lawfully sealed; the duty of the board in canvassing returns and recounting the votes is ministerial and may be enforced in a proper case by the court. *Id.*

4. The apparent purpose of Act No. 327, Pub. Acts 1913, providing for a recount of votes by boards of supervisors, was to change the previously existing law, as to the power of the board to ascertain whether or not the statutory requirements relative to sealing and preserving the ballots had been observed. *Id.*

5. Where the board in recounting the ballots in certain districts took testimony to ascertain what was the condition of the ballots and whether they had been tampered with, and where no claim was made to the board that they had been tampered with, but objection was raised only to the condition of the ballot boxes, or manner of sealing them, the determination to open the boxes was a decision of fact, and, whether right or wrong, was conclusive upon the court. *Id.*

6. Mandamus is not the proper remedy to vacate an order reinstating an appeal from probate court by legatees of an estate, in relation to the final account of the administrator, where the notice of filing the appeal was not served in time, and the record or other papers were not returned from probate court in the 30 days' period as required by statute (1 Comp. Laws, § 672; 5 How. Stat. [2d Ed.] § 12120). *Gifford* v. *Circuit Judge*, 546.

7. The writ of mandamus will be allowed to require the lower court to take jurisdiction of a proceeding or action because a refusal to take jurisdiction would tend to deprive the litigant of any remedy, but if jurisdiction be wrongfully assumed the determination may be reviewed by appeal or writ of error, in which case mandamus is not ordinarily granted. *Trumbull Motor Car Co.* v. *Circuit Judge*, 554.

8. Hence, the refusal to quash service of process on a foreign corporation for the reason assigned that the point should be presented by a plea in abatement, the court retaining jurisdiction over the parties and denying the motion amounted to the retention of jurisdiction and it could be reviewed on error. The remedy at law was adequate, and mandamus will not issue. *Id.*

Digitized by Google

MARKET VALUE—See DAMAGES (5, 8).

MARRIAGE SETTLEMENT—See CANCELLATION OF INSTRUMENTS (4).

MARRIED WOMEN—See BILLS AND NOTES (4, 5).

MASTER AND SERVANT.

1. Plaintiff, an experienced employee of a wrecking company, was not entitled to recover for injuries sustained while he was engaged in wrecking a building by reason of the defective or weakened condition of defendant's derrick from which he improperly ordered one of the cranks removed, and, having notice of the defective state of the derrick and of the excessive weight of the girder that the men were lowering, attempted to check its descent with a rope that pulled plaintiff against and into the machine. *Dams* v. *Vinton Co.*, 12.

2. On account of an alleged defective ladder that gave way with plaintiff while he was helping to put out a fire on defendant's premises, whither he had been drawn out of curiosity upon hearing the fire alarm, no recovery for injuries sustained in rendering such voluntary aid to defendant would be authorized. Plaintiff should not have been permitted to go to the jury, in the absence of any contract of hiring between the parties averred in the pleadings or shown by the proofs, and merely upon the theory that he was obeying orders of the superintendent of defendant's plant; the burden resting on an employee to prove the contract of employment relied upon. *Smedley* v. *Chemical & Iron Co.*, 64.

3. It is a question of fact, from testimony that is in conflict or sustains different inferences, whether a claimant under the workmen's compensation act, not among those who are conclusively presumed to be dependent, was actually in the dependent class. (Act No. 10, Extra Session 1912.) *Miller* v. *Storage & Cartage Co.*, 360.

4. Testimony to prove that a deceased brother contributed to claimant's support, though she partially sustained herself by her labors as a stenographer, reviewed on certiorari to the Industrial Accident Board, and *held*, to sustain its award of compensation. *Id.*

5. The test of dependency is not whether the members of the family could support life without the contributions of decedent, but whether they depended on him for part of their income or means of living. *Id.* 361.

6. Claimant was injured while he was employed by the defendant as a common laborer and made application for an award under the workmen's compensation act. The injury took place before the employer had filed its notice of intention to take the benefit of the statute. *Held*, that the filing of such notice was essential to the jurisdiction

Digitized by Google

MASTER AND SERVANT—Continued.

of the accident board, and unless the employer consented to the proceedings they were invalid. *Shevchenko* v. *Railway*, 421.

7. No right to recover for personal injuries that may have occurred before the filing of the statutory application and its approval by the accident board existed without the employer's consent. *Id.*

8. The fact that the employer did not object formally to the jurisdiction of the Industrial Accident Board until the entry of the decree did not warrant the granting of an award, when it was made to appear that the point was brought up and discussed at the close of claimant's testimony before the board and was raised before the arbitration committee. *Id.*

9. Where decedent was a section foreman, having supervision over switches, and was charged with sending reports to his employer of the time of his crew at regular intervals, and was also required, as part of his duties, to look after the cleaning of the switches in case of a storm, and to attend to this duty at night if necessity required, it could not be found, as a matter of law, that he was off duty one stormy night in winter when he left home, as he announced, to mail his report, saying that if he was out late he would be working on the switches, and when it was the last night for the mailing of the report and the employee was found killed, about midnight, on the section of tracks of which he was in charge. *Papinaw* v. *Railway Co.*, 441.

10. In performing either duty, deceased was not a trespasser on the right of way, which he used as a way to reach the depot of the respondent. *Id.* 442.

11. The burden rested on the master to prove that the accident happened while the employee was not performing his duties, upon proofs tending to show that he was. *Id.*

12. And his position was distinguishable from those of employees who were not compelled to be at the master's call at any time, but had fixed hours of labor. *Id.*

13. Where a brother-in-law of decedent employed an attorney, who gave the employer notice of his death, in compliance with the workmen's compensation act, within the statutory three months period, and within six months had the wife, who resided in a foreign country, execute a power of attorney ratifying the giving of notice, but did not receive the instrument within the six months, the notice was sufficient, as it afforded an opportunity to investigate. Act No. 10, Extra Session 1912. *Matwiczuk* v. *Car & Foundry Co.*, 449.

14. Where defendant's special officer, empowered to police its yards and prevent any one from stealing freight or dam-

Digitized by Google

MASTER AND SERVANT—Continued.
aging property, to look out for suspicious characters and to put out persons who were not in the yards on business, was suddenly seized by two men, who seemed to him to be a couple of intruders that he had expelled on the previous day, and who had threatened him with violence, so that he was excited and lost his head, and shot both assailants, who proved to be acquaintances of the officer, and not the parties he supposed them to be, the right of decedent to recover for the alleged reckless or negligent act of the officer of defendant railway company depended on whether he acted in self-defense only, or in the performance of his duties, having in mind the purpose of protecting his employer's property. *Cook* v. *Railroad Co.*, 456.

15. It could not be decided, as a matter of law, which intent actuated the employee in firing upon the persons who assaulted him; the question was one of fact and should have been submitted to the jury. *Id.*

16. Any act done through lack of judgment, discretion, or from infirmity of temper or under the influence of passion, somewhat beyond the strict line of the servant's authority, is chargeable to the master, and the law will not undertake to fix with precision the line that distinguishes the act of the servant from the act of the individual; so that if in the discharge of his duties the employee lost his head and exceeded the force that he was authorized to use, the defendant was liable. *Id.*

17. A servant and agent of defendant railroad company, called for cross-examination under Act No. 307, Pub. Acts 1909, might be contradicted by the plaintiff, as if defendant had called the witness in its own behalf. *Id.* 457.

18. In a proceeding under the workmen's compensation act for compensation to a servant of an automobile company for the loss of part of the sight in claimant's right eye, evidence that the cause was a gonorrheal infection after getting a piece of steel in the eye, that the employee had not been affected with the disease, and that an attempt had been made to remove the steel by a fellow workman in the factory, by rolling back the eyelid on a match, that another employee removed the same, and that the eye was normal before the injury, *held*, to support the finding of facts of the Industrial Accident Board that the accident arose out of, or in the course of, his employment. *Cline* v. *Studebaker Corporation*, 514.

19. However, for the partial loss of the sight of claimant's eye, which could be minimized by the use of glasses, so that no diminution of earnings took place, and no impairment of his earning capacity appeared from the testimony, the board was not authorized to award compensation (section 10, Act No. 10, Extra Session 1912), though without

Digitized by Google

MASTER AND SERVANT—Continued.

glasses he had only ten per cent. of normal vision but fifty per cent. with them. *Id.*

20. Claimant, a carpenter foreman, in the employ of his brother, participated in an altercation with certain teamsters who attempted to deliver some brick on the premises; the brother, who owned the property where the brick was unloaded, having directed claimant to prevent the delivery of brick there. Next day the trespasser returned with reinforcements and began another quarrel with the owner who prevailed over his opponent, but claimant was injured by a missile thrown by the attacking party while he was endeavoring to prevent interference on the part of the others with the controversy going on between the brother and his assailant. He volunteered the service he was trying to render. *Held*, that the injury was not received in the course of his employment so as to entitle claimant to compensation under Act No. 10, Extra Session 1912. *Clark* v. *Clark*, 652.

21. Where evidence, in a workmen's compensation case, had a tendency to show that decedent suffered a severe fall and injury to his head, and later fell a second time and was killed, and the medical testimony was in conflict as to whether the death resulted from concussion of the brain caused by his prior injury, or from heart trouble, from which it was claimed he had previously suffered, the finding and award of the Industrial Accident Board rested on an issue of fact and should be affirmed. *Deem* v. *Paper Co.*, 655.

22. A decedent who had been ordered, in the process of wrecking a building, to dig a trench and not to dig below the footings, but who went too deep, causing the concrete wall adjacent to it to tilt towards him, was guilty of negligence barring his recovery for injuries that he sustained, and without some affirmative proof that he misunderstood orders, because of his ignorance of the English language, his estate could not recover on the theory of failure to provide a safe place. *Aphoresmenos* v. *McIntosh*, 680.

23. Where the servant is engaged in making his own place to work, or where he creates a dangerous situation as an incident of the work he is doing, the master is not chargeable with failure to provide a safe place. And there was no occasion to warn deceased of a danger which could only arise from disobedience of the employer's instructions. *Id.* 681.

See APPEAL AND ERROR (7); NEGLIGENCE (5); PLEADING (1); TRESPASS VI ET ARMIS (1, 2).

MEASURE OF DAMAGES—See DAMAGES (7).

MECHANIC'S LIENS.

1. A verified notice of mechanic's lien claimed by a contractor,

Digitized by Google

MECHANIC'S LIENS—Continued.

describing the property as the "W ½ of lot 12, which lies across Main street in the village of C. from the property owned by ———— and between said Main street and the D. & M. Railway Company right of way and lies right west of lots 12 and 13, and the E ½ of lot 11 in said village of C. owned and occupied by this affiant," sufficiently described the premises on which complainant constructed a cement wall and cellar to create a valid lien, the correct description being lots 11 and 12, block 2, Hosmer & Earl's Addition to the village of C., excepting therefrom 40 feet off the east side of said lot 12; where the contestant had accepted a mortgage with knowledge that the construction work was in progress and where the mortgage described the property correctly. See 3 Comp. Laws, § 10714. *Hicks* v. *Finbarg*, 332.

2. False and impossible parts of descriptions in conveyances may be rejected, when by doing so a good description remains. *Id.*

3. The objection that the owner's name was given as M. Finbarg, instead of giving in full the Christian name of the party was not fatal to the lien, in the absence of a dispute concerning his identity. *Id.*

MEMORANDA—See TAXATION (2).

MENTALLY INCOMPETENT—See INSANE PERSONS.

MICHIGAN RAILROAD LIABILITY ACT—See DAMAGES (3); PLEADING (1).

MINORS—See INTOXICATING LIQUORS (2, 3).

MISTAKE IN ENTERING JUDGMENT—See PRACTICE (3).

MODIFICATION OF PRICE—See BROKERS (1).

MOOT QUESTIONS—See APPEAL AND ERROR (4).

MORTGAGES.

1. One may purchase the mortgage interest, after foreclosure by advertisement, from the buyer at public sale, and a junior incumbrancer may secure an assignment before sale and foreclose in his own interest or he may buy the equity of the purchaser during the period of redemption. *McCreery* v. *Roff*, 558.

2. And where the prior mortgage was redeemed the second mortgagee, or his assignee, might foreclose as against the owner or any subordinate interests. *Id.*

3. In the absence of peculiar and unusual equities, no reason is apparent why the holder of a second mortgage may not purchase the equitable interest acquired at foreclosure sale by the first mortgagee, or his representatives, and the effect is not the same as redemption, whereby it

Digitized by Google

MORTGAGES—Continued.

has been held that the foreclosure deed becomes void and of no effect. *Id.*

4. Section 9361, 3 Comp. Laws, requiring the approval of the probate judge to the assignment of the rights of an estate in real property acquired on foreclosure, etc., does not apply to the purchase of a mortgage interest before expiration of the redemption period: it would become applicable after the title of the estate had become absolute. *Id.*

5. The defense of equitable estoppel, based on the theory that the defendant was induced to believe that complainant was not insisting on the rights acquired by foreclosure sale, and he therefore relaxed his effort to raise the money, is an equitable defense and will be entertained only in a suit in chancery. *Id.* 559.

See CORPORATIONS (2); QUIETING TITLE (3).

MOTIONS—See NEW TRIAL (1); TRESPASS VI ET ARMIS (4).

MUNICIPAL CORPORATIONS.

1. A pavilion erected in a park to serve the purpose of a waiting room for cars and of shelter for those who made use of the park, and as a refreshment stand, and properly situated therefor, did not invade the limitations of the dedication whereby it was expressly stipulated that the property should be used for a public park and for no other purpose. *Dodge* v. *Improvement Ass'n*, 16.

2. A public park may be defined as an open or inclosed tract of ground adapted to and set apart for pleasure, recreation, ornament, light and air of the inhabitants of the town in or near which it is located. *Id.* 17.

3. Under the drainage law of the State of Michigan, special assessment districts formed in the construction and assessment of a drain lying within two adjacent counties are not public corporations and have no power to sue or to be sued; they are created simply for the purpose of collecting taxes from the land which benefits by the construction of the improvement and the money raised for the drain cannot be diverted to any other purpose. *Spiegel* v. *Barrett*, 111.

4. Under section 2471, 1 Comp. Laws (1 How. Stat. [2d Ed.] § 953), judgments recovered against county officers may be spread against the entire county, but in case of a drainage district including portions of two counties, the statute could have no application. *Id.*

5. Since the county has no interest financially in the construction of a drain, and the cost is required to be paid by property owners within the assessment district, damages for breach of a contract and for work done under such

Digitized by Google

MUNICIPAL CORPORATIONS—Continued.
contract could not be assessed against the county as a whole. *Id.*

6. Accordingly, an action of assumpsit does not lie against the drain commissioners of two counties in which a district is situated and plaintiff's remedy for money due under his contract, and for loss of profits thereunder, would be a different form of procedure. *Id.*

7. A pedestrian, who fell into a temporary ditch, laid across the crosswalk, in ice and snow, that had accumulated to a depth of fifteen inches and upwards on a city street, where the danger was concealed by a light snowfall, and was unknown to the plaintiff, was entitled to have the verdict of the jury on the questions of negligence and proximate cause, the testimony showing that snowstorms were and should have been anticipated when the ditch was built. *Morrison* v. *City of Ironwood*, 117.

8. To render a negligent act the proximate cause of the alleged fall, it was not essential that the persons who constructed the ditch might have foreseen the particular consequence or injury, or manner in which it took place, if by an exercise of reasonable caution it might have been anticipated that some injury might occur. *Id.*

9. Under the provisions of the charter of the city of Lansing, which prohibits any member of the city council from holding any office or position, or receiving any employment directly or indirectly connected with the government, and forbids any member of the council or person holding any elective or appointive office from being interested in any contract with the city, under a penalty of fine or imprisonment, a purchase of lumber by the board of public works from a corporation in which a member of the police and fire commission was a stockholder, vice president and manager, was invalid and justified the lower court in entering a decree in chancery enjoining the payment of the price. *Fcrle* v. *City of Lansing*, 501.

10. Such transaction is not analogous to the furnishing of light and water to city officials and members of the council, which is in the nature of a privilege open to all the citizens or of a common benefit available upon an equality of terms. *Id.* 502.

11. The prohibition of the charter prevents the city from making purchases of a corporation of which any officer of the city or member of the council is an officer or stockholder, a sale being a form of contract intended to be prohibited. *Id.*

12. Although the charter provisions do not in terms make the contract or sale void, the imposition of the penalty has by implication a like effect. *Id.*

13. A contract made void by the charter or by statute is incapable of ratification nor can a recovery upon it be per-

Digitized by Google

MUNICIPAL CORPORATIONS—Continued.

mitted; the courts will leave the parties where it finds them. *Id.*

14. And want of knowledge by the officer, of the execution or existence of the contract, is not conclusive; it is unenforceable whether he helped to procure it or not. *Id.*

15. Where plaintiff sustained injuries to his person in using a temporary road or turnout to cross an interurban track, it being out of repair, and the township in which it was situated was not alleged to have constructed the temporary way, or participated in the establishing of the same, which was not made a public highway by dedication or by statutory proceedings, the trial court did not err in sustaining a demurrer to the declaration, since the liability of a township for injuries sustained in the highway is limited by statute to public ways. Act No. 283, Pub. Acts 1909 (2 How. Stat. [2d Ed.] §§ 2462, 2174, 2179). *Brown* v. *Township of Byron*, 584.

16. The liability of municipalities for injuries upon highways is purely statutory and cannot be enlarged by construction. *Id.*

17. Public highways can be established in two ways only under the statutes of this State: (1) by proceedings instituted by the commissioner of highways of a township upon written application of freeholders, notice, etc.; (2) by user. *Id.*

18. One who travels outside of the limits of a legally established highway must be held to do so at his peril, so far as his statutory remedy against the township is concerned, even though the municipality has, without legal authority, alone or in conjunction with others, constructed a temporary way. *Id.*

See ADVERSE POSSESSION (4-6); APPEAL AND ERROR (2); HIGHWAYS AND STREETS (2); INJUNCTION; STREET RAILWAYS (4, 5); TAXATION (4); WATERS AND WATERCOURSES (1).

NAMES—See MECHANIC'S LIENS (3); PARTNERSHIP.

NECESSITY FOR DRAIN—See DRAINS (2, 5, 6).

NEGLECT TO FILE REPORT—See CORPORATIONS (3).

NEGLIGENCE.

1. A cause is proximate if it operates to produce particular consequences without the intervention of any independent unforeseen cause, but for which the injuries would not have occurred. *Morrison* v. *City of Ironwood*, 117.

2. Evidence that plaintiff, who was lawfully in the store of defendant, entered its elevator to be carried up, when it dropped about four feet, causing a passenger on the point of entering to fall against and injure plaintiff, who was unable to produce any testimony to establish the cause

Digitized by Google

NEGLIGENCE—Continued.

of the accident except proof of a statement by defendant that the car fell because some one jostled the arm of the operator, and made the machine descend, was not sufficient proof of a negligent cause to require the court to take the verdict of the jury. *Elsey* v. *Hudson Co.*, 135.

3. No presumption of negligence arose by reason of the mere falling of the elevator; proof of negligent conduct of the proprietor was necessary to raise an issue for the jury. *Id.*

4. Where the proprietor of a building leased to defendant club the upper stories, together with a power freight elevator, for ten years, and the defendant club undertook the expense of operating and repairing the elevator, the proprietor reserving the privilege of using the elevator, to himself and other tenants, in so far as their use did not interfere or conflict with the requirements of the club, and agreed to pay a just proportion of the expenses thereof, where, also, the landlord granted to the club the use of part of the basement, at a subsequent time, to pay his part of the expenses of maintaining the elevator, the landlord was not responsible for the negligent killing of plaintiff's intestate, who was delivering beer for defendant club, whose servant operated the elevator at the time of the accident; and upon proofs showing that the elevator was delivered to the defendant club in good condition. *Sikora* v. *Fellowcraft Club*, 235.

5. But the servant in control of the elevator, being employed by the club, which maintained the apparatus, was chargeable with neglect for starting it just as decedent attempted to enter, and for his negligence the club was responsible, under the rule of *respondeat superior*. *Id.* 236.

6. Testimony to the effect that decedent's superior, having charge of the delivery of beer, told deceased to remain with the horse and directed the operator to start the elevator, was admissible as part of the *res gestæ*, and it was error to exclude it. *Id.*

7. *Held*, that it was erroneous to instruct the jury that the defendants were under obligation to maintain the elevator gate in repair, when the issue should have been limited to the simple question whether the person directing decedent had notified him to remain with the horse and whether the elevator started as decedent entered or was already in motion. *Id.*

8. And it was improper to charge the jury that defendants owed towards the intestate a high degree of care, or to inform them that the latter was not required to stop, listen, or specially examine the elevator before entering. *Id.*

See AUTOMOBILES (1); CARRIERS; EVIDENCE (4-6); INTOXICATING LIQUORS (1); MASTER AND SERVANT (1, 2, 9, 14, 22, 23); MUNICIPAL CORPORATIONS (7, 8); RAILROADS (2, 3); SALES (4); STREET RAILWAYS (1, 2).

Digitized by Google

NEWLY DISCOVERED EVIDENCE—See NEW TRIAL.

NEW TRIAL.

1. On motion for a new trial on the ground of newly discovered evidence to the effect that articles sold by the plaintiff were not specially made, the fact that defendant had over eight months in which it might have discovered the evidence, and that it was cumulative in its nature, furnished sufficient reason for denying the new trial. *Hydrex Silent Exhaust Works* v. *Engine Works*, 431.

2. Unless the evidence is material and likely to change the result it is not sufficient ground for a new trial. *Id.*

See APPEAL AND ERROR (1, 10); DAMAGES (1, 2); INSURANCE (4); TRESPASS VI ET ARMIS (4).

NONDELIVERY OF MESSAGE—See TELEGRAPHS AND TELEPHONES (1).

NONPREJUDICIAL OMISSION—See TAXATION (1).

NONRESIDENCE—See LIMITATION OF ACTIONS (1).

NONRESIDENTS—See COSTS (2).

NOTARY PUBLIC—See DEEDS (2).

NOTICE—See ADVERSE POSSESSION (1, 2); BILLS AND NOTES (2, 3); CONTRACTS (2); DEEDS (7); FRAUDULENT CONVEYANCES (1); JUDGMENT (4); MANDAMUS (6); MASTER AND SERVANT (1, 6, 7); MUNICIPAL CORPORATIONS (14); PRACTICE (4); SALES (8); TRESPASS VI ET ARMIS (2); TRUSTS (2, 3).

NOTICE OF CLAIM—See MECHANIC'S LIENS (1).

NOTICE OF DANGER—See RAILROADS (1).

NOTICE OF INJURY—See MASTER AND SERVANT (13).

NOVATION—See CONTRACTS (1, 2).

OCCUPATION—See BOUNDARIES (2).

OFFER AND ACCEPTANCE—See COMPROMISE AND SETTLEMENT (1).

OFFICERS AND DIRECTORS—See CORPORATIONS (1).

OPINION EVIDENCE—See ESTATES OF DECEDENTS (1); EVIDENCE (10).

ORAL CONTRACTS—See CONTRACTS (3).

ORDINANCES—See ADVERSE POSSESSION (6); EVIDENCE (12).

OTHER OFFENSES—See CRIMINAL LAW (2).

PARKS—See INJUNCTION; MUNICIPAL CORPORATIONS (1, 2).

PAROL AGREEMENTS—See QUIETING TITLE (1).

Digitized by Google

PAROL EVIDENCE—See RELEASE (1).

PARSONAGE—See TAXATION (7).

PARTIES—See CONTRACTS (1); MANDAMUS (1, 2); PRACTICE (6).

PARTNERSHIP.

1. Attorneys associated as copartners are required, under Act No. 164, Pub. Acts 1913, to file a certificate showing the members of the copartnership, their address, and the partnership name; failure to comply with the statute is a sufficient ground to deny recovery in an action of assumpsit upon an assigned account or claim. *Sloman* v. *Bender*, 258.

2. Interpreting the provisions of said act, the language "carrying on any business as copartners," includes the profession or practice of law. *Id.*

3. When the law prescribes a method for determining the existence of qualifications for a specified calling, and in compliance therewith one who has been found qualified is vested with authority to follow the calling which is otherwise forbidden to him, he becomes subject to legislative regulation, as are other citizens engaged in legitimate pursuits; and the legislature is vested with authority to control the practice of law, as in other business or professional relations, by classifying copartnerships with other pursuits or lines of business. In the absence of any exception in the act no ground for excluding a copartnership of attorneys is to be found. Act No. 164, Pub. Acts 1907. *Id.* 259.

PAVILION—See MUNICIPAL CORPORATIONS (1).

PERMIT—See ADVERSE POSSESSION (6).

PERSONAL INJURIES—See AUTOMOBILES; DAMAGES (1, 2); EVIDENCE (2, 9, 12); MASTER AND SERVANT (1, 2, 7, 20, 22); MUNICIPAL CORPORATIONS (7, 15, 16, 18); NEGLIGENCE (2, 3, 5); RAILROADS (1, 3); STREET RAILWAYS (1); TRESPASS VI ET ARMIS (1).

PLEADING.

1. Where plaintiff brought an action under the Michigan statute (Act No. 104, Pub. Acts 1909), for the death of a fireman on defendant railway, and two years later, at the trial, asked for leave to amend the declaration so as to bring the claim within the Federal act relating to employer's liability (35 U. S. Stat. 63, as amended; U. S. Comp. Stat. 1913, §§ 8657-8665), not referred to in the pleading, which, however, alleged that the defendant owned and operated a system extending through Michigan and Indiana, the request, which did not involve an addition of new matter, was rightfully granted and did not operate to introduce a new cause of action. *Jorgensen* v. *Railway Co.*, 537.

Digitized by Google

PLEADING—Continued.

2. The Federal statute is a general law and is in force in Michigan as it is everywhere else, and the case was not like amending the declaration so as to plead a foreign statute. *Id.*

3. Where, in a suit for a breach of a contract of sale, the amended declaration averred that plaintiffs duly and seasonably furnished to the defendant complete information for detail drawings as required by the contract and duly and seasonably kept, observed, and performed all of the terms and conditions of said contract on their part to be kept, observed, and performed, a demurrer was rightly overruled, particularly after the first trial wherein evidence covering the allegation was offered and received so that the defendant understood the claims made by plaintiff: the objection that the declaration stated the conclusions of the pleader was not sufficient and is held to be over technical. *Sauer* v. *Construction Co.*, 577.

See EQUITY (2, 8); PRINCIPAL AND AGENT (2).

POISON—See SALES (4).

PRACTICE.

1. It is from the entry of the judgment that the period begins to run in which amendments may be proposed to the findings of fact and law of the court, not from the filing of the findings. Circuit Court Rule 26*b*. *Wisconsin Chair Co.* v. *Circuit Judge*, 548.

2. Upon the trial of an issue of fact by the court without a jury, the judgment cannot properly be entered until after the findings have been filed. *Id.*

3. The findings are the basis for the judgment; yet, a judgment inadvertently entered before the filing of the findings is not void and may be regarded as in the nature of provisional action which only becomes perfected when the findings are completed. *Id.*

4. Whether findings of fact and law were filed during the term or in vacation when the parties would be entitled to notice, if the premature entry of judgment tends to deprive any party of his rights, it should, if necessary, be vacated and set aside. Some injury must be shown, however. Such a judgment will not be set aside simply as matter of abstract right. *Id.* 549.

5. And where counsel for the relator did not become aware of the entry of judgment in a nonjury trial before the court, until nearly six weeks had elapsed, and some weeks thereafter made application for leave to open the case and proposed amendments to the findings, which were referred to in the motion, but were not therewith filed, and the court requested the attorney to submit the proposed amendments to the court, the motion which in ef-

Digitized by Google

PRACTICE—Continued.

fect was one for an extension of time, was not improperly overruled, counsel declining to submit the proposed findings to the consideration of the trial court, without justification or excuse. Circuit Court Rule 26*b*. *Id.*

6. Upon writ of error to review a judgment for plaintiff in summary proceedings for the possession of real property, the cause should be entitled in the names of the parties to the proceeding before the circuit court commissioner, who is not properly a party in the circuit or appellate court and should not be named in the title of the action. *McCreery* v. *Roff*, 558.

See EQUITY (1); MANDAMUS (8).

PREJUDICIAL ERROR—See TAXATION (3).

PRESCRIPTION—See ADVERSE POSSESSION (5); WATERS AND WATERCOURSES (3).

PRESUMPTIONS—See ADVERSE POSSESSION (2); BILLS AND NOTES (5); DEEDS (2); DIVORCE (5); ESTATES OF DECEDENTS (3); EVIDENCE (6); LANDLORD AND TENANT (1, 2); NEGLIGENCE (3); TAXATION (10); WILLS (3).

PRINCIPAL AND AGENT.

1. Where plaintiff contracted with defendant to cut and haul logs at a specified price, agreeing to do the work according to instructions, evidence that defendant's woods superintendent, who had on previous occasions assumed to direct the performance of similar contracts with defendant's consent, instructed the plaintiff to deck the logs at an agreed extra compensation, immediate shipment being impossible because of a shortage of cars, the trial court was warranted in submitting to the jury the question of the extent of the agent's authority. *Martindale* v. *Manufacturing Co.*, 477.

2. The court properly instructed the jury that plaintiff was entitled to recover, under the common counts, the value of the extra services performed, if they should determine that defendant's agent was acting within the scope of his authority in instructing plaintiff to perform them. *Id.*

3. In reviewing a judgment for plaintiff in an action for breach of a contract of sale of a quantity of apples, the charge of the court, submitting to the jury the question of defendant's son's agency to enter into the contract, *held*, to be warranted by the evidence and to cover the issue in a sufficient manner. *Hecht* v. *Ebers*, 573.

See BILLS AND NOTES (3); BROKERS (1); MASTER AND SERVANT (13, 17); SALES (9).

PRIVATE INTERNATIONAL LAW—See BILLS AND NOTES (4); CONTRACTS (5); LIMITATION OF ACTIONS (4-6).

Digitized by Google

PROBABLE CAUSE—See MALICIOUS PROSECUTION (1).

PROBATE APPEAL—See MANDAMUS (6).

PROCESS—See MANDAMUS (8).

PROCURING CAUSE—See BROKERS (1).

PROPER REMEDY—See MANDAMUS (3).

PROSECUTING ATTORNEY—See COSTS (1); MANDAMUS (2).

PROVOCATION—See TRESPASS VI ET ARMIS (3).

PROXIMATE CAUSE—See MUNICIPAL CORPORATIONS (8); NEGLIGENCE (1).

PUBLIC IMPROVEMENTS—See DRAINS (1, 5, 6).

PUBLIC INTEREST—See MANDAMUS (1).

PUBLIC OFFICIALS.

Act No. 331, Pub. Acts 1913, requiring the State tax commission to devote their entire time to the duties of their respective offices, and increasing the salary of each commissioner from $2,500 to $3,500 per annum, adds no new duties to the official obligations theretofore existing, and, even if it did, could not lawfully provide for additional compensation in violation of Art. xvi, § 3, of the State Constitution. *Kearney* v. *Board of State Auditors*, 666.

See CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS (9-11, 14).

PUBLIC PARK—See MUNICIPAL CORPORATIONS (2).

PUBLIC POLICY—See DURESS (2); MUNICIPAL CORPORATIONS (13).

QUANTUM MERUIT—See ESTATES OF DECEDENTS (3).

QUASHING SERVICE—See MANDAMUS (8).

QUESTIONS FOR JURY—See MASTER AND SERVANT (15).

QUIETING TITLE.

1. Where complainants brought a suit to quiet title to store property in Detroit that defendants averred and gave testimony to show had been conveyed in trust to complainant charged with the obligation to pay over to his two brothers such sums of money as they might need, and where the claimed trust had been recognized by complainant who had paid considerable sums to the brothers from time to time, and who later voluntarily executed a quit-claim deed to one of the sisters-in-law, the conveyance being intended for the purpose of enabling her husband to borrow money and with the oral arrangement that it should be reconveyed to the grantor (afterwards carried out), and, where it further appeared that the grantee quit-

Digitized by Google

QUIETING TITLE—Continued.

claimed said premises to a son, who also found a blank deed from the first grantor, and filling up the spaces, recorded it so as to clear up title in his mother, the trial court properly treated the deeds from the sister-in-law to her son as void, and rightly found defendant to be the owner in fee, the complainants failing to produce evidence that would preponderate in their favor, and hence not sustaining the burden of proof resting upon them. *Prentis* v. *Prentis*, 1.

2. Under section 9509, 3 Comp. Laws, performance of the alleged oral agreement sufficiently met any objection as to the invalidity of the trust because it was not in writing; if the executory arrangement was fully carried out by the parties, no sufficient reason existed to invalidate their acts by reason of the statute of frauds aforesaid. *Id.*

3. *Held*, further, that the grant of title by the wife of one of the brothers to her husband was understandingly executed and that she knew the purpose was to permit him to mortgage the property. *Id.*

4. And the evidence failed to meet the burden of proof upon the contention that equitable title rested in the three brothers, two of whom received unequal shares of the rent, and paid taxes jointly; having but a tendency to show a beneficial use, not an equitable right in the real estate. *Id.* 2.

QUITCLAIM—See DEEDS (3, 7).

RAILROADS.

1. Plaintiff, a boy of nine years and six months, who looked only one way in crossing defendant's three tracks, and, after a train had passed on one of them, attempted to go across and was struck by a train that approached from the other direction, where he had passed over the crossing frequently, knew the danger at the same and realized that it was his duty to look out for trains, etc., could not recover for the injuries that he sustained; he should have been held guilty of contributory negligence by the trial court, as matter of law. *Henry* v. *Railroad Co.*, 45.

2. The failure on the part of a boy driving across a railroad track to look for a car, after he had reached a point 90 feet from the rails, barred a recovery for a horse killed, where he looked in one direction and then devoted his attention to the other side, and if he had turned to look again within 70 feet of the crossing he might have seen the approaching car, and where he was 12 years of age and knew the nature of the danger, etc. *Otto* v. *Railroad Co.*, 463.

3. Where plaintiff, returning home from a village in Marquette county on a dark and stormy night in winter, because of a heavy fall of snow, was not able to guide the

Digitized by Google

RAILROADS—Continued.

horses, but permitted his team to have their heads and follow the road by instinct, and, at a point in the highway at which defendant railroad crossed it diagonally, the team diverged from the road, following the track for some distance, when they encountered and were struck by a train, he was guilty of contributory negligence, barring a recovery for the personal injuries which he sustained; defendant's negligence in failing to have statutory safeguards and fence at the crossing was not a sufficient reason for permitting plaintiff to recover. *Dugas* v. *Railway Co.*, 620.

4. One should exercise as much caution about remaining upon a railroad track as in going on it, and upon plaintiff's testimony that he looked for a train on arriving at the crossing but did not thereafter ascertain whether or not he had crossed, the trial court was right in directing a verdict for defendant. *Id.*

See CARRIERS; DAMAGES (3); MASTER AND SERVANT (9, 10, 14, 17); PLEADING (1).

RATIFICATION—See CORPORATIONS (2); MUNICIPAL CORPORATIONS (13).

REAL PROPERTY—See BROKERS (1); DEEDS (3).

REASONABLE CARE—See MUNICIPAL CORPORATIONS (8).

REASONABLE FORCE—See TRESPASS VI ET ARMIS (2).

REASONS—See APPEAL AND ERROR (1).

REBUTTAL—See EVIDENCE (11).

RECITALS—See DEEDS (3).

RECOGNITION—See ADVERSE POSSESSION (3).

RECORD—See APPEAL AND ERROR (1); TAXATION (2).

RECOUNT OF BALLOTS—See MANDAMUS (1, 3, 5).

REDEMPTION—See MORTGAGES (1-3).

REDUCING JUDGMENT—See TRESPASS VI ET ARMIS (4).

RELEASE.

1. A release is to be construed from the standpoint of the parties at the time they executed it; extrinsic evidence is admissible to explain the circumstances under which it was entered into and the nature of the transaction to which it was designed to apply without adding to or subtracting anything from the words used. It embraces all demands to which its provisions apply, whether contemplated or not, and direct parol evidence that a certain claim was not included or contemplated in the preliminary negotiations is inadmissible. *Butterfield* v. *Reynolds*, 152.

Digitized by Google

RELEASE—Continued.

2. Plaintiff and defendant indorsed jointly with others the notes of a manufacturing corporation that subsequently became insolvent. In consideration that plaintiff would continue to act as indorser certain securities were deposited with him to cover his indorsement and protect him from liability, and at the same time, he executed to defendant a release in general terms "from all actions, causes of action, suits, controversies, claims and demands, whatsoever, for or by reason of any matter, cause, or thing from the beginning of the world down to the 6th day of April," etc. No other contractual obligations subsisted between them. Two months later, in order to renew one of the notes, defendant indorsed new paper, on which plaintiff sued for contribution. *Held*, that defendant was not liable; that the new note had been given for the indebtedness existing when they executed the release, and no new debt was created, that the release barred any liability upon the previous indebtedness, or a renewal thereof. *Id.* 153.

RELIGIOUS PURPOSES—See TAXATION (6).

REMAINDER—See WILLS (5).

REMEDY—See CONTRACTS (5); DEEDS (6); FRAUDULENT CONVEYANCES (2).

RENT—See LANDLORD AND TENANT (1).

REPAIRS—See NEGLIGENCE (7).

REPAYMENT OF TAXES—See TRUSTS (5).

REPLICATION—See EQUITY (1).

REPORTS—See CORPORATIONS (3).

REQUESTS TO CHARGE—See APPEAL AND ERROR (5, 9); LIMITATION OF ACTIONS (3); TRIAL (3).

RESERVATION—See EJECTMENT.

RES GESTÆ—See NEGLIGENCE (6).

RES IPSA LOQUITUR—See NEGLIGENCE (3).

RES JUDICATA—See APPEAL AND ERROR (3).

RESPONDEAT SUPERIOR—See MASTER AND SERVANT (16).

RETROACTIVE EFFECT—See DEEDS (8).

REVOCATION—See WILLS (1, 3).

RIGHTS IN STREETS—See HIGHWAYS AND STREETS (2); STREET RAILWAYS (5).

RIGHTS OF SELLER—See APPEAL AND ERROR (6).

Digitized by Google

RIPARIAN RIGHTS—See WATERS AND WATERCOURSES (1).

RULES—See EQUITY (1).

SAFE PLACE—See MASTER AND SERVANT (22, 23).

SALES.

1. Where plaintiff's decedent agreed to buy certain lumber from the defendant, and nothing was expressed in the correspondence as to the time when title should pass, but an inspection, to be paid for by both parties was required, and part of the lumber was delivered upon inspection, as agreed; the contract providing that decedent should take all the lumber of a quality described or named, and where the parties recognized in subsequent dealings that the lumber had all been sold and several letters passed in which they assumed that plaintiff was the buyer, and plaintiff advanced a considerable part of the purchase price, and where it appeared that the lumber had been piled separately, the vendee was not, as matter of law, entitled to recover advances made before it was burned, but the issue was one to be determined from all the acts of the parties and their dealings subsequent to the claimed sale. *Germain* v. *Loud*, 38.

2. In the absence of a specific arrangement concerning the title to the property, in a contract of sale, the question whether title has passed is usually an issue of fact, to be determined from the acts done and promises made and from all the attendant circumstances. *Id.*

3. Both attorneys requesting the court to decide the issue as one of law, the trial judge did not err in determining the issue and in not submitting the point to the jury, although different inferences were admissible from the testimony. *Id.*

4. Evidence that plaintiff bought bran of the defendant which he fed to two cows and they died with symptoms of arsenical poisoning, that what remained of the feed was screened, a portion submitted to a chemist who analyzed the sample and found traces of arsenic amounting to about a grain to one and a half ounces, that the bran had been swept up off the floor of defendant, who used rat poison on his premises, though he introduced evidence to show that the poison contained no arsenic, was sufficient to support a verdict for plaintiff and warranted an inference that the bran contained poisonous material. *Newell* v. *Reid*, 174.

5. Evidence, in a suit for breach of warranty of a motor truck, considered and *held*, insufficient to support a recovery, and not tending to show a breach, or that the seller had warranted the truck in any way differently than the manufacturer whom he represented had warranted it. *Lardie* v. *Iron Works*, 210.

Digitized by Google

SALES—Continued.

6. Plaintiff sold defendant a quantity of potatoes which were delivered and were later found to be frozen. A tender back was made by the defendant, and plaintiff brought an action for the purchase price; defendant claimed that plaintiff had expressly represented and warranted that the potatoes were in fit condition for use. The testimony showed that at the time of delivery of the first lot the defendant found a number of pounds of frozen potatoes and that the plaintiff said that the rest were all right, that a few had been scattered about and been frozen in his cellar. The court submitted the case to the jury on the theory that if there was no express warranty defendant might rely upon the implied warranty. *Held*, that the testimony as to the representation of the plaintiff, though uncertain, or meagre, was sufficient to support a verdict for the defendant. *Pentland* v. *Jacobson*, 339.

7. Under Act No. 100, Pub. Acts 1913, § 15, and subd. 6, an express warranty does not preclude the existence of and reliance upon an implied warranty unless the two are inconsistent. *Id.*

8. The court did not err in charging the jury that if defendant did not examine the potatoes he was entitled to rely upon the implied warranty of fitness or quality, and upon the statement made by the plaintiff that it would be his duty, after finding defects in the potatoes, to notify plaintiff within a reasonable time, that what was a reasonable time would be for the jury, that if he made no examination but relied upon the warranty that the potatoes were fit for food and were merchantable, afterwards finding that they were not merchantable or fit for food, and notified plaintiff of the fact within a reasonable time, he would not be required to pay for the potatoes. *Id.* 340.

9. Defendant, a music dealer, who had been in business associated with his wife, was not, as a matter of law, entitled to a directed verdict because the music for the price of which plaintiff brought action had been originally charged to his wife, who ordered it, the business belonging in fact to him, and the goods becoming a part of his stock, where there was evidence that he made payments on the account so as to reduce it below the price paid and he had informed an attorney, that had the account for collection, that he had received the goods and would pay for them, and he had not returned the merchandise to plaintiff, claiming, in explanation thereof, that they were negotiating concerning the claim, etc. The question was for the jury. *Feist* v. *Root*, 595.

10. Any subsequent promise of defendant to pay a debt which in fact was his wife's was void if it was not in writing, under the statute of frauds. *Id.* 596.

11. Nor did the trial court err in charging the jury, as to this phase of the defense, that if the goods were not pur-

Digitized by Google

SALES—Continued.

chased by authority of defendant or accepted by him as his goods, he would not be bound by any promise to pay for them, unless he made it in writing and for a valuable consideration. *Id.*

12. And if the goods were purchased for and accepted by defendant, there was no failure of consideration, inasmuch as he had theretofore received the music ordered. *Id.*

See BROKERS (1); DAMAGES (6); MUNICIPAL CORPORATIONS (11); PLEADING (3).

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR (1, 5, 8); TRIAL (1).

SECTION LINES—See HIGHWAYS AND STREETS (1).

SECURITY FOR COSTS—See JUDGMENT (1, 2).

SEPARATE MAINTENANCE—See DIVORCE (1).

SERVICES—See ESTATES OF DECEDENTS (1).

SET-OFF AND RECOUPMENT—See LANDLORD AND TENANT.

SIDEWALKS—See ADVERSE POSSESSION (4).

SIGNALS—See STREET RAILWAYS (1).

SNOW AND ICE—See APPEAL AND ERROR (2); MUNICIPAL CORPORATIONS (7).

SPEED—See EVIDENCE (9, 10).

STATE TAX COMMISSION—See CONSTITUTIONAL LAW; PUBLIC OFFICIALS.

STATUTE OF FRAUDS—See CONTRACTS (3); QUIETING TITLE (2).

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES—See COSTS (1); DEEDS (8); DIVORCE (2); DRAINS (6); INSANE PERSONS (2); MUNICIPAL CORPORATIONS (4, 15, 16); PARTNERSHIP (1); TAXATION (3, 5); TRUSTS (1, 3); WITNESSES.

STATUTORY REQUIREMENTS AS TO BALLOT BOXES—See MANDAMUS (4).

STOCK, SHARES OF—See EQUITY (3).

STREET RAILWAYS.

1. Plaintiff was struck and injured as he attempted to drive across defendant's interurban track, on a dark night. He testified that he stopped, looked, and listened before he drove on the tracks, that he neither saw nor heard the approaching car, that no whistle or other signal was sounded,

Digitized by Google

STREET RAILWAYS—Continued.

and that the car did not display a headlight. He discovered the car when it was about seventy-five feet away and did what he then could to avert an accident. He claimed to have been two rods from the track when he made his first observation, and admitted that he did not look again until his horses were nearly across the track, which his team crossed about at a right angle. The track lay along the street on which he was traveling and crossed to the north side at the point of the collision, the car coming from the direction in which he was going. *Held*, that the testimony warranted an inference that if a headlight had been in place on the car he would have been able to discover its approach, that the evidence was sufficient to sustain a verdict for plaintiff, who could not be held chargeable with contributory negligence as a matter of law. *Dunn* v. *Railway*, 294.

2. In an action for the negligent killing of plaintiff's intestate, at a crossing, evidence that the deceased stopped his automobile three or four yards from the interurban track, that the view was obstructed by a house in the direction from which the car approached, that when he saw the car he tried to back up, but his automobile went ahead then started back, and that the interurban car was operated at a speed of about 50 miles an hour, without signals of any kind, though one of plaintiff's witnesses testified that the automobile was only seven or eight inches from the car track when it stopped, supported a verdict for plaintiff and raised an issue of fact as to the questions of negligence and contributory negligence. *Littlewood* v. *Railway*, 388.

3. That the testimony of the witnesses was negative rather than affirmative upon the subject of sounding the signals, did not require the court to direct a verdict, when it was uncontradicted by any testimony offered by defendant railway company. *Id.*

4. A wye, as employed in the grant by a village council of the right to construct new track, meant a track with two legs, one joining the main track from one direction and the other joining the main track from a different direction. *Falls* v. *Railway Co.*, 644.

5. Where the common council of the village of Spring Lake authorized defendant railway company by resolution to lay a single track or wye, in a street to connect with existing track "and extend the same in a northerly direction across State street to, in, and upon" a lot adjoining complainant's property, and where, in so doing, because of the overhang of the cars, it became necessary to remove a shade tree in the portion of the street fronting upon complainant, the defendant was authorized to remove the tree, and the lower court rightly entered a decree giving

Digitized by Google

STREET RAILWAYS—Continued.

complainant the option of transplanting the tree or cutting it down after thirty days' written notice. *Id.*

See DAMAGES (1); EVIDENCE (4); HIGHWAYS AND STREETS (2).

STREETS—See MUNICIPAL CORPORATIONS (7).

SUBSCRIBING WITNESS—See WILLS (2).

SUMMARY PROCEEDINGS—See COSTS (2); MORTGAGES (5); PRACTICE (6).

SUPPORT AND MAINTENANCE—See DIVORCE (2).

SURETYSHIP—See RELEASE (2).

SURPLUSAGE—See MECHANIC'S LIENS (2).

SURVIVAL ACT—See ESTATES OF DECEDENTS (4).

TACKING ON POSSESSION—See BOUNDARIES (3).

TACKING RUNNING OF STATUTE—See LIMITATION OF ACTIONS (5).

TAXATION.

1. The omission from the assessment roll of the number of acres in rural lands assessed for general taxes does not invalidate the tax, because no prejudice results to the owner. 1 Comp. Laws, § 3922 (1 How. Stat. [2d Ed.] § 1870). *Auditor General* v. *Nelson*, 93.

2. In making changes increasing the amount of property taxed, or assessed valuations, the board of review of a city, in the absence of the clerk, substantially complied with the requirements of the statute by directing one of the members to keep minutes, which he preserved in the form of rough memoranda, later filed with the clerk and prepared in typewritten form for permanent record in his office by the clerk (1 Comp. Laws, § 3323; 2 How. Stat. [2d Ed.] § 5853), where the memoranda, considered with the tax rolls, showed the changes so made, and where the amount of increase could be ascertained by computation, although the records did not show item by item the several amounts that the board added to or deducted from the valuations as fixed by the supervisors. *Story & Clark Piano Co.* v. *Hilderink*, 123.

3. No sufficient prejudice resulted to the taxpayer who ascertained the amount of increase and the fact of change from the rolls and memoranda kept by the board, and who was sufficiently informed to be able to file a protest; the tax being presumed to be valid under 1 Comp. Laws, § 3922 (1 How. Stat. [2d Ed.] § 1870), and unless the irregularity was of a jurisdictional nature the statute cured the defect. *Id.*

Digitized by Google

TAXATION—Continued.

4. Only if the official action can be shown to have been fraudulent could the court hold the tax illegal, and the fraud must be clearly established. 3 Comp. Laws, § 3899. *Id.*

5. Evidence considered and *held* not to establish the claim that the assessors or board of review had omitted any property from the tax roll intentionally. *Id.*

6. A lot owned by a city church and used as a tennis court for a part of the time after its purchase, being intended for a parsonage, which the plaintiff commenced to erect after the taxes for the year had been assessed and which was occupied by its rector in November of that year, was properly assessed, and could not be treated as exempt property until it was actually used for religious purposes. 1 Comp. Laws, § 3830, subd. 5, as amended by Act No. 174, Pub. Acts 1911. *St. Joseph's Church* v. *City of Detroit*, 408.

7. A parsonage may be defined as a house in which a minister of the gospel resides; it may be with land or without it. *Id.*

8. Under the charter of the city of Detroit, property is required to be assessed before the first of April, and the taxes become an indebtedness of the owner from the time of listing the land for assessment. The taxes levied become a lien on the first of July. *Id.*

9. It is a cardinal rule that exemption statutes, unlike homestead statutes, should receive a strict construction. *Id.*

10. A grant of exemption from taxation is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power and the burden is on the claimant to establish clearly his right to exemption. *Id.* 409.

See COSTS (1); MUNICIPAL CORPORATIONS (5).

TAXES PAID—See TRUSTS (4).

TELEGRAPHS AND TELEPHONES.

1. In an action for damages for the loss of a contract of employment, alleged to have been caused by defendant's failure to forward a message to plaintiff on board a steamer at M., where the evidence shows that plaintiff did not arrive at M. till the following day, which was Sunday, and the steamer remained in port Sunday and Monday, and that a delivery on Monday would have enabled plaintiff to secure the position, defendant was not entitled to a directed verdict for the reason that plaintiff was not at M. on Saturday to receive the message had it been forwarded. *McPherson* v. *Telegraph Co.*, 471.

2. Where the proposed contract of employment was definite as

Digitized by Google

TELEGRAPHS AND TELEPHONES—Continued.

to salary and term of employment, and the evidence shows that the employer was desirous of engaging plaintiff and plaintiff was desirous of securing the position, it was sufficiently definite in its terms to furnish a basis for recovery, notwithstanding it gave the employer the right to discharge plaintiff for a violation of the rules, and plaintiff had the right to leave before the end of the term if he chose to do so. *Id.*

TENANTS IN COMMON—See ADVERSE POSSESSION (2, 3); HUSBAND AND WIFE.

TERM OF OFFICE—See CONSTITUTIONAL LAW; PUBLIC OFFICIALS.

THREATS OF PROSECUTION—See DURESS (1).

TIME—See EQUITY (1); PRACTICE (1, 4).

TITLE OF ACTION—See PRACTICE (6).

TITLE TO PERSONALTY DESTROYED BY FIRE—See SALES (1, 2).

TORTS—See MUNICIPAL CORPORATIONS (8).

TOWNSHIP BOARDS—See DRAINS (1).

TOWNSHIP CLERKS—See DRAINS (5).

TOWNSHIPS—See DRAINS (2); MUNICIPAL CORPORATIONS (15).

TREES—See HIGHWAYS AND STREETS (2); STREET RAILWAYS (5).

TRESPASSERS—See MASTER AND SERVANT (9, 10).

TRESPASS VI ET ARMIS.

1. Where plaintiff, who was a domestic servant of defendant, asked for a few days off to enable her to visit her child in a neighboring town, and defendant refused the request, over which an altercation ensued, and plaintiff claimed to have been severely injured, the rules applicable to a trespasser were not in effect as to plaintiff's right to remain; she had the right to a reasonable time to collect her belongings and make ready for departure. *Gungrich* v. *Anderson*, 144.

2. The defendant was not entitled to use force to expel the servant, as in case of an intruder, or to force her to depart without reasonable notice to enable her to leave peaceably. *Id.*

3. The charge of the court that defendant would not be justified in assaulting plaintiff, if the latter called her a liar, but that the evidence went to the amount of damages, was not error, but correctly stated the law. *Id.* 145.

4. *Held*, also, that a verdict of $250, reduced by the trial court

Digitized by Google

TRESPASS VI ET ARMIS—Continued.

to $150, was not so excessive, as modified, that the appellate court should award a new trial. *Id.*

See EVIDENCE (1, 2).

TRIAL.

1. It was erroneous for plaintiff's attorney to invite the jury to give her what they would consider a mother or sister of their own would be entitled to receive, under like circumstances, but in the absence of a ruling of the court and exception to it, there was no question for the Supreme Court. *Gungrich* v. *Anderson*, 144.

2. No error was committed by the court in declining to give requests to charge as framed by counsel for the defendant, if the subject was covered by the general instructions. *Feist* v. *Root*, 596.

3. Where counsel for defendant, in response to an inquiry of the court at the close of the charge, orally asked the court to instruct the jury in relation to defendant's contention and claim that plaintiff turned out of his course and ran into the side of defendant's automobile, and the court declined to instruct further, but the charge failed to cover the point referred to by defendant's attorney, the error was reversible and prejudicial although no request in writing was preferred; if such request was desired, counsel should have been given time in which to prepare it. *Harnau* v. *Haight*, 601.

See APPEAL AND ERROR (5, 9); DAMAGES (4); DRAINS (4); EVIDENCE (2); INSURANCE (3); LIMITATION OF ACTIONS (3); PRACTICE (3, 5); SALES (3, 11); TRESPASS VI ET ARMIS (3); WILLS (4).

TRUST RELATIONS—See CORPORATIONS (1).

TRUSTS.

1. An express trust can be created only in the manner prescribed by the statutes of this State and may be created for the beneficial interest of any person or persons when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the statute limitations as to time. 3 Comp. Laws, §§ 8839, 8844, 8845, 8848. *McQuillan* v. *Ayer*, 566.

2. A purchaser from a trustee takes not only the legal title, but the beneficial title as well, when the conveyance is made rightfully and under the terms of the trust, or if made wrongfully, when the purchaser is ignorant of the violation of the trust. *Id.*

3. A conveyance by the trustee ordinarily effects a complete transfer of the beneficial as well as the legal estate, and while the grantee is charged with notice of the limitations of the trustee's title, as contained in the instrument

Digitized by Google

TRUSTS—Continued.

creating it, or of such limitations as may be actually known to him, there is no doubt that, under the statutes of this State, the trustee, under a deed that only describes him as trustee, can convey to one ignorant of the terms of the trust an absolute title both legal and equitable. *Id.*

4. Since he who seeks equity must do equity, a defendant who asks affirmative relief may be required to reimburse a complainant for taxes which the complainant was compelled in good faith to pay to protect her interest under a tax title purchase, though the tax title was void. *Id.*

5. And the defendant was erroneously relieved of liability for taxes paid by the complainant before the date of his title deed, and during the seizin of his grantors. *Id.*

See QUIETING TITLE (1, 2); WILLS (2).

UNLAWFUL SALE OF LIQUOR—See INTOXICATING LIQUORS (2).

VACATING JUDGMENT—See PRACTICE (4).

VALUE OF SERVICES—See COMPROMISE AND SETTLEMENT (4); ESTATES OF DECEDENTS (1); EVIDENCE (5).

VILLAGES—See STREET RAILWAYS (4, 5).

VOID TAX TITLES—See TRUSTS (4).

VOLUNTEER—See MASTER AND SERVANT (2, 20).

WANT OF CONSIDERATION—See INSURANCE (2).

WANT OF PROBABLE CAUSE—See MALICIOUS PROSECUTION (2).

WARNING AND INSTRUCTING SERVANT—See MASTER AND SERVANT (23).

WARRANTY—See DEEDS (1, 5); SALES (4-6, 8).

WATERS AND WATERCOURSES.

1. Upon a bill in chancery to restrain a municipal corporation from diverting water by artesian wells from the neighborhood of complainant's wells, an order overruling defendant's demurrer is affirmed in order that proofs may be taken to assist the court in determining the question, because of its great importance in this State. *Osborn* v. *City of Ann Arbor*, 96.

2. The right to drain or dispose of surface water on land cannot be exercised by concentrating and pouring it, by means of an artificial ditch or drain, in unusual quantities and velocity greater than would be natural, upon adjacent property. *Peacock* v. *Stinchcomb*, 301.

3. Prescriptive rights can only be exercised in the manner and to the extent that they have been used during the prescriptive period. *Id.*

Digitized by Google

WATERS AND WATERCOURSES—Continued.

4. Evidence, in a suit for an injunction to restrain a defendant from maintaining a drain, reviewed, on appeal, and *held*, to warrant the trial court in entering a decree restraining the flowing of complainant's real property. *Id.*

WEIGHT OF EVIDENCE—See INSURANCE (4).

WILLS.

1. Where decedent, in her will, cut off her husband, against whom she had filed a bill for divorce, with a gift of $10, giving as a reason, "because he robbed me of money from time to time until I fired him out of the house, and I refused to live with him," the instrument having been lost, mislaid or destroyed, testimony tending to show the alleged state of bad feeling between testatrix and her husband was properly admitted to assist the jury in determining the issue, which was whether or not the will had been revoked. *In re Keene's Estate*, 97.

2. Where decedent in drafting her will placed certain property in trust for two minor children of her brother, the effect of having the trustee appear as a subscribing witness did not necessarily bear on the issue whether or not the will had been executed and later revoked; nor was the validity of the bequest a question to be submitted to the jury. *Id.*

3. If it is shown that after a proper search the will of a testatrix cannot be found and it cannot be traced out of the possession of deceased, the presumption of revocation may be aided by evidence of declarations made by the testatrix. The question becomes an issue of fact for the jury. *Id.* 98.

4. Where there was evidence in the record to prove the testatrix had frequently stated to her relatives, prior to her last illness, that she had so arranged her affairs as that her brother's children should receive the bulk of her property, and there was evidence tending to show her antipathy toward her husband, the trial court was justified in submitting to the jury the testimony which had some tendency to disprove revocation as alleged by contestant. *Id.*

5. In a devise of property to one of the daughters of testatrix, remainder to her children, and the remaining property to another daughter, remainder to her heirs, and in the event of the death of the grandchildren or any of them, before the time for receiving his or her share, the same should pass to the brothers and sisters, to be equally divided between them, and in case all the children of one daughter should die their shares to go to the children of the other daughter, the word heirs as applied to the second daughter, should be understood as intending the legal heirs of the devisee. *Brooks* v. *Parks*, 490.

6. In its legal and technical sense, the word heir is understood

Digitized by Google

WILLS—Continued.

as designating the persons appointed by law to succeed in case of intestacy. Wherever the word is employed by a testatrix unaccompanied by qualifying or explanatory expressions, it must be allowed the meaning the law gives it and those only will come within the class thus described who would take under the intestate laws. *Id.*

7. A husband is the heir of his wife under the intestate statutes. By the provisions of the foregoing will, the husband of the second daughter mentioned in the will took one-half the estate left by his wife, their son having died before becoming seised of his share. The use of the word heirs as to the one daughter, and children as to the other, indicated the intent of the testatrix that the property should descend differently. *Id.* 491.

WITNESSES.

The fact that defendant was called for cross-examination under Act No. 307, Pub. Acts 1909, did not, where there was no contradictory evidence, deprive his testimony of its weight, but it was entitled to the same force or effect as it would have had if he had been called as a witness in his own behalf. *Aphoresmenos* v. *McIntosh*, 681.

See CRIMINAL LAW (3, 4); DIVORCE (5); MASTER AND SERVANT (17).

WORDS AND PHRASES—See INSANE PERSONS (2); MUNICIPAL CORPORATIONS (2); NEGLIGENCE (1); STREET RAILWAYS (4); TAXATION (7); WILLS (6).

WORK AND LABOR—See COMPROMISE AND SETTLEMENT (3); ESTATES OF DECEDENTS (1, 3); FRAUDULENT CONVEYANCES (1).

WORKMEN'S COMPENSATION LAW—See APPEAL AND ERROR (7); MASTER AND SERVANT (3, 6, 13, 18-21).

WRITTEN CONTRACT—See CONTRACTS (3); SALES (10, 11).

WYE—See STREET RAILWAYS (4).

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google